

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-678

EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners*

— v. —

CITY OF CLEVELAND, OHIO, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Chronological List of Relevant Docket Entries

June 16, 1969—Plaintiffs Executive Jet Aviation, Inc. and Executive Jet Sales, Inc.'s¹ complaint filed in United States District Court for the Northern District of Ohio, Eastern Division.

July 24, 1969—Defendant Dicken's answer filed.

July 30, 1969—Defendants City of Cleveland and Phillip A. Schwenz's² answer filed.

July 30, 1969—The City's third-party complaint filed.

Aug. 19, 1969—EJA's answers to interrogatories of the City filed.

Jan. 22, 1970—The City's motion to dismiss filed.

Jan. 27, 1970—Third-Party Defendant United States of America's answer to the City's third-party complaint filed.

Feb. 17, 1970—Defendant Dicken's motion to dismiss filed.

Mar. 4, 1970—Deposition of Edward J. McAvoy filed.

June 12, 1970—Order and memorandum of district court entered dismissing complaint for lack of jurisdiction and dismissing third-party action.

July 10, 1970—EJA's notice of appeal filed.

Aug. 24, 1971—Opinion and judgment of the Court of Appeals for the Sixth Circuit.

Dec. 16, 1971—EJA's petition for rehearing denied.

Feb. 22, 1972—Petition for certiorari granted.

¹ Hereinafter referred to collectively as "EJA."

² Hereinafter referred to collectively as "the City."

Complaint

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed June 16, 1969]

Civil Action No. C69-464

**EXECUTIVE JET AVIATION, INC. and EXECUTIVE JET SALES,
INC., *Plaintiffs***

v.

**CITY OF CLEVELAND, OHIO, East 6th and Lakeside Avenue,
Cleveland, Ohio**

**PHILLIP A. SCHWENZ, 724 Sandlewood,
Elyria, Ohio**

- and -

**HOWARD E. DICKEN, 23225 Cedar Point Road,
Cleveland, Ohio, *Defendants***

1. This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears.

2. At all times herein mentioned plaintiff Executive Jet Sales, Inc., was the owner of a Falcon Mystere 20 jet aircraft Registration No. N367EJ (hereafter the Falcon), and plaintiff Executive Jet Aviation, Inc. (hereafter EJA) was the operator in lawful possession of the Falcon.

3. At all times herein mentioned defendant City of Cleveland, Ohio (hereafter the city) was and is a municipal corporation organized and existing under the laws of the State of Ohio. At all times herein mentioned the city owned, operated, controlled and maintained the Burke Lakefront Airport, Cleveland, Ohio (hereafter the airport), as a municipal airport for use by the public; and operated the airport for revenue and profit as a proprietary function receiving fees from the users of the airport, including plaintiffs.

4. At all times herein mentioned defendant Phillip A. Schwenz was employed by the city as airport manager of the airport, and at all times herein mentioned was acting in the scope and course of that employment as a servant, agent and employee of the city. At all times herein mentioned the city acted by and through its servants, agents and employees, including Phillip A. Schwenz, who were at all times herein mentioned acting within the scope and course of their employment and on behalf of the city.

5. At all times herein mentioned defendant Howard E. Dicken was employed by the United States Federal Aviation Administration (hereafter FAA) as an Air Traffic Control Specialist and was on duty in that capacity at the airport. At all times herein mentioned defendant Howard E. Dicken was acting within the scope and course of that employment and was a person acting under an officer of the United States or an agency thereof and was acting under color of such office.

6. On July 28, 1968, plaintiffs' Falcon aircraft taxied on and took off from the airport, all under the direct supervision and control of one or more of the defendants. On said date defendant Howard E. Dicken cleared the Falcon for takeoff from the airport.

7. On or about July 28, 1968, defendant Howard E. Dicken negligently and carelessly supervised and controlled, or failed to supervise and control, plaintiffs' Falcon; and negligently and carelessly failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which defendant Howard E. Dicken knew or should have known, including a huge flock of seagulls which were sitting on the active runway of the airport at the time defendant Howard E. Dicken cleared plaintiffs' Falcon for takeoff from said runway.

8. On and before July 28, 1968, the city and defendant Phillip A. Schwenz, and each of them, negligently and care-

lessly operated, controlled, maintained, supervised and inspected the airport; negligently and carelessly failed to remove and eliminate hazards to aircraft existing on, over and adjacent to the airport, including the aforementioned flock of seagulls; and negligently failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which the city and defendant Phillip A. Schwenz knew or should have known, including the aforementioned flock of seagulls.

9. As a result of the aforesaid negligence and carelessness of defendants, and each of them, plaintiffs' Falcon struck several hundred seagulls shortly after takeoff from the airport when the flock flushed; and the Falcon was totally destroyed when it crashed and sank in the navigable waters of Lake Erie off shore from the airport, all to plaintiffs' damage in the sum of One million, five hundred fifty thousand dollars (\$1,550,000.00).

10. As a further result of this negligence and carelessness plaintiffs were deprived of the use of the Falcon for the period reasonably required to obtain a replacement aircraft, the reasonable rental value for this period being Two hundred thousand dollars (\$200,000.00).

11. As a further result of this negligence and carelessness, plaintiffs incurred salvage, raising and other costs in the sum of Thirteen thousand, six hundred forty-three dollars and 64 cents (\$13,643.64).

WHEREFORE, plaintiffs demand judgment against the defendants, or one or more of them, in the sum of One million, seven hundred sixty-three thousand, six hundred forty-three dollars and 64 cents (\$1,763,643.64), with interest thereon as provided by law, for the costs of this action and for all other proper relief.

[Signatures omitted in printing]

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Answer of Defendant Howard E. Dicken

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Title omitted in printing]

[Filed July 24, 1969]

Defendant, HOWARD E. DICKEN, by his attorney, BERNARD J. STUPLINSKI, United States Attorney for the Northern District of Ohio, answering the plaintiffs' complaint, alleges as follows:

1. The allegations contained in paragraph "1" of the complaint present questions of law, which are respectfully referred to the court for determination.

2. It is without any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "2", "3", "4" and "8" of the complaint.

3. In response to paragraph "5" of the complaint, admits that at all times mentioned herein this defendant was employed by the United States of America, through the Federal Aviation Administration, in the capacity of an air traffic controller and was at the time in question acting in the scope of his employment as such air traffic controller and except as above-admitted, denies each and every other allegation contained in said paragraph.

4. In response to paragraph "6" of the complaint admits that this defendant issued an air traffic clearance for take-off to aircraft No. N367EJ and except as above-admitted, denies each and every allegation contained in said paragraph.

5. Denies each and every allegation contained in paragraphs "7", "9", "10" and "11" of the complaint.

FIRST DEFENSE

6. That the negligence of the pilot of plaintiffs' aircraft caused or contributed to the accident and the damages sued for herein.

SECOND DEFENSE

7. That the complaint fails to state a claim upon which relief can be granted against this defendant.

THIRD DEFENSE

8. That plaintiffs are not the real party in interest.

FOURTH DEFENSE

9. That the provisions of 28 U.S. Code 2680(a) are applicable to this defendant.

FIFTH DEFENSE

10. That the provisions of 28 U.S. Code 2680(h) are applicable to this defendant.

SIXTH DEFENSE

11. That the flight of plaintiffs' aircraft was made in connection with, subject to and with acceptance of the known risks and perils of the air through which said aircraft travelled, and acts of God, over all of which this defendant had no control; and by undertaking said flight, plaintiffs, through their agents, servants or employees, assumed, accepted, and undertook all said risks and dangers, which were obvious and well-known or which should have been obvious and well-known to them and said accident and damages arose out of and resulted from said risks and damages and acts of God.

WHEREFORE, defendant, Howard E. Dicken, respectfully requests judgment in his favor, dismissing the plaintiffs' complaint, together with the costs and disbursements applicable under law, and such other, further and different relief as to the court may seem just and proper.

[Signatures and Certificate of Service
Omitted in Printing]

**Answer of Defendants
City of Cleveland and Phillip A. Schwenz**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Title omitted in printing]

[Filed July 30, 1969]

Now come defendants City of Cleveland (hereinafter "Cleveland") and Phillip A. Schwenz (hereinafter "Schwenz"), and for their joint answer to the complaint, state as follows:

FIRST DEFENSE

1. These defendants deny the allegation of paragraph 1 of the complaint.

2. These defendants have no knowledge or information sufficient to form a belief with respect to the allegations of paragraph 2 of the complaint, and hence deny each and all said allegations for want of knowledge.

3. These defendants admit that at all times mentioned in the complaint Cleveland was and is a municipal corporation organized and existing under the laws of the State of Ohio; that Cleveland owned, operated and maintained the Burke Lakefront Airport, Cleveland, Ohio (hereinafter the "Airport"), as a municipal airport for use by the public, and that it charged fees to persons who used the Airport to cover in part the expense of its operation. These defendants deny that they controlled the Airport, and say that ground traffic at the Airport as well as air traffic in the vicinity thereof including all take-offs and landings were controlled by representatives of the Federal Aviation Administration (hereinafter "FAA") located in the control tower of the Airport. On July 28, 1968 one of the FAA representatives in the control tower of the Airport was defendant Howard E. Dicken.

4. These defendants admit that at all times mentioned in the complaint, Schwenz was employed by Cleveland as manager of the Airport and was acting in the course and scope of such employment.

5. These defendants admit the allegations of paragraph 5 of the complaint.

6. These defendants admit that on July 28, 1968 a Falcon aircraft bearing registration number N367EJ (hereinafter the "Falcon") taxied and attempted to take off from the Airport, and that defendant Dicken cleared that aircraft for such take-off, but defendants deny that the Falcon was ever under any supervision or control, direct or otherwise, of Cleveland or Schwenz. On the contrary, the Falcon was at all times under the direct and immediate supervision and control of William P. Flower and Charles E. Dirck, its pilots, who were then and there acting as employees of plaintiffs within the course and scope of such employment.

7. These defendants deny that defendant Dicken failed to warn the said pilots of the Falcon concerning the presence of a large flock of seagulls which were then sitting on one of the runways of the Airport designated as runway 6L. Defendants say that the said pilots were fully aware of the presence and the position of said birds on runway 6L and nevertheless elected to attempt their take-off from that runway although another suitable runway free of such seagulls was available for their use.

8. These defendants deny each and all of the allegations contained in paragraph 8 of the complaint, and say that the presence of seagulls on runway 6L on July 28, 1968 was caused by weather conditions over which these defendants had no control; that defendants attempted on several occasions on said date to frighten said seagulls away from the Airport, but that all such attempts were unsuccessful and that there are no effective means which these

defendants may legally employ which will clear the runways of the Airport of seagulls during certain weather conditions. Defendants further say that for a substantial period of time prior to the attempted take-off of the Falcon on July 28, 1968, warnings of the presence of said seagulls on runway 6L at the Airport were sent out by teletype and were posted on the Notam Board in the operations office of the Airport, which warning was or should have been observed by the pilots of the Falcon before they boarded that aircraft on said date. Further warnings concerning the presence and position of the seagulls on runway 6L were given to said pilots of the Falcon by radio before they attempted to take off on that runway; and the presence and position of the seagulls on that runway were clearly visible to said pilots before they commenced their take-off on July 28, 1968.

9. These defendants admit that while attempting a take-off on runway 6L at the Airport on July 28, 1968, the Falcon struck a number of seagulls as the result of which the take-off was aborted and the Falcon sustained certain damage in the resulting crash, but defendants deny that the Falcon was totally destroyed, deny that it sank in the navigable waters of Lake Erie and deny that said aircraft was damaged in the manner or to the extent alleged by plaintiffs in their complaint.

10. These defendants deny the allegations of paragraph 10 of the complaint.

11. These defendants deny the allegations of paragraph 11 of the complaint.

12. These defendants deny each and all of the allegations against them in the complaint contained, save and except such as are herein expressly admitted to be true, to the same extent and with the same effect as though each such allegation were herein set forth at length and herein categorically denied.

SECOND DEFENSE

13. For their second defense, these defendants adopt and incorporate herein as though fully rewritten herein at length each and every one of the allegations, admissions and denials contained in the foregoing first defense, paragraphs 1 through 12, and further state:

14. The pilots of the Falcon, acting in the course and scope of their employment by plaintiffs, knew or in the exercise of ordinary care and prudence should have known of the presence of a large flock of seagulls on runway 6L at the Airport at the time they commenced their attempted take-off on said runway on July 28, 1968.

15. Plaintiffs were careless and negligent in the following respects and particulars which directly and proximately caused the crash of the Falcon at the time and place aforesaid:

- (a) Plaintiffs were negligent in failing to heed the warnings given to their pilots concerning the presence of seagulls on runway 6L at the Airport on July 28, 1968.
- (b) Plaintiffs were negligent in failing to use runway 6R for their take-off at the time and place aforesaid, which runway was free of seagulls.
- (c) Plaintiffs were negligent in attempting to take off from runway 6L at the Airport with full knowledge and appreciation of the hazard to such take-off from the large flock of seagulls on said runway.

16. The aforesaid negligent acts and omissions by plaintiffs were the direct and proximate, primary and active cause of the crash of the Falcon at the Airport on July 28, 1968 and of such damage to and reduction in value of that aircraft, loss of its use and salvage expense as may

have occurred as a result of that crash, by reason whereof plaintiffs are barred and prevented from any recovery herein against these defendants.

THIRD DEFENSE

17. For their third defense, these defendants adopt and incorporate herein as though fully rewritten herein at length each and every one of the allegations, admissions and denials contained in the foregoing first and second defenses, paragraphs 1 through 16, and further state:

18. Prior to the time they commenced the take-off of the Falcon at the Airport on July 28, 1968, plaintiffs knew of the presence and position of the large flock of seagulls on runway 6L. Nevertheless plaintiffs voluntarily commenced and continued the take-off of the Falcon on that runway with full knowledge and appreciation of the hazards to the take-off caused by the presence of said seagulls although runway 6R was free of such seagulls and was available for use by plaintiffs in said take-off. Plaintiffs willingly and knowingly exposed themselves and the Falcon to such hazards and perils as arose by reason of attempting a take-off under such circumstances and hence plaintiffs assumed all the risks resulting from the presence of said seagulls including the risk of damage to and reduction in value of the Falcon, the loss of its use and salvage expense, which assumption of the risk by plaintiffs bars and prevents their recovering against these defendants herein.

FOURTH DEFENSE

19. For the fourth defense, these defendants adopt and incorporate herein as though fully rewritten herein at length each and every one of the allegations, admissions and denials contained in the foregoing first, second and third defenses, paragraphs 1 through 18.

20. The FAA cleared the Falcon for take-off on runway 6L at the Airport on July 28, 1968. If it should be found herein that the FAA cleared the Falcon for such take-off without warning its pilots of the presence and position of the large flock of seagulls on said runway, which failure to warn is expressly denied, then the issuance of such take-off clearance without giving warning of the presence and position of said seagulls constitutes a separate, independent, intervening cause of the crash of the Falcon which could not have been foreseen by these answering defendants, by reason whereof these defendants are not liable to plaintiffs for any damage to or reduction in value of the aircraft or for its loss of use or salvage expense which may be found to have been sustained as a result of the crash.

FIFTH DEFENSE

21. These defendants are informed and believe that plaintiffs have been indemnified by their insurance carrier or carriers for such loss as they may have sustained as a result of the crash of the Falcon at the Airport on July 28, 1968.

22. This action is not brought or prosecuted in the name of the real party in interest as required by Rule 17(a) of the Federal Rules of Civil Procedure.

WHEREFORE, having fully answered, defendants Cleveland and Schwenz pray that the complaint be dismissed with prejudice as to them and that they may have judgment herein on the complaint and for their costs herein.

[Signatures and Certificate of Service
Omitted in Printing]

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**Exhibit A to Plaintiffs' Answers to Interrogatories of
Defendant City of Cleveland**

STATEMENT OF WITNESS

[Filed August 19, 1969]

July 30, 1968

Pilot Statement: W. P. Flower, P/C
C. Dirck, C/P

The Aircraft—EJ367—arrived at Burke Lakefront July 26 approximately 1600 hours. It was immediately refueled by Remmert-Werner, secured and the crew departed to the motel. The crew consisted of W. P. Flower, P/C, C. Dirck, C/P, and Miss J. Vargo, Hostess.

On the 28th at approximately 1000 hours, the crew arrived at Lakefront for a ferry flight to Portland, Maine, picking up passengers and continuing to White Plains, N.Y. The aircraft was uncovered and preflighted by the First officer. The Hostess made a final inspection of the cabin in preparation for picking up passengers and the Captain obtained the weather, filed a flight plan, and obtained a release from the Company dispatcher. After engine start we received clearance to taxi to Runway 6 Left. As the flight was non-revenue it is company policy for the first officer to fly in the left seat for proficiency and training. The first officer was flying from the left seat, the captain in the right seat, and the Hostess was seated in the first seat on the right side facing aft.

The check list was completed and on taxiing out, it was noted that one aircraft was on landing rollout on 6 Left, and ground advised an aircraft was on the approach to 6 Right. The ground advised to expedite across 6 Right. At this point there were, to my knowledge, no advisories regarding birds from ground control. In obtaining the weather by phone for Cleveland, Portland, and White Plains, there was no information given regarding birds as

would appear on the end of the Cleveland sequence. On instructions, the pilot in the right seat, switched to power frequency, and requested take-off. The take-off clearance initially was faded with the final portion of the statement saying something to the effect "Caution, birds *on end of runway.*" These exact remarks can be substantiated by the tower tape. The bird caution to me was a routine advisory as would be given for a few or small number of birds. The transmission did not possess extreme hazard information. As the take-off clearance was not clear a second request was made and a second clearance was issued for take-off. Neither pilot could see the birds on the end of the runway. After clearance to take-off was received the pilot in the left seat executed the take-off and rotated at approximately 125 Kts. The pilot in the right seat made a power check, voiced 30 Kts, 100 Kts., V1 and rotate. The pilot in the left seat could not distinguish the bird line prior to rotation and in his estimation could not abort the take-off. On rotating a sea of birds on the runway became visible. Approaching the birds at approximately 75 feet caused them to flush and fly into the aircraft, apparently hundreds hitting the belly and engine intakes. Bird impact substantially reduced the air speed an estimated 15 or 20 Kts. The pilot in the left seat raised the gear handle, the pilot in the right seat maneuvered the throttles in an effort to obtain partial power. There was almost immediate total loss of power. The engine temperature indicated above 850 degrees on both engines and the RPM dropped rapidly below 70%. The aircraft flew in a semi-stalled attitude stall horn blowing until contacting the water. The aircraft struck the top of a pick-up truck and a portion of the airport perimeter fence. The aircraft contacted the water in a flat attitude and on a second impact water entered the cabin almost immediately. Only a few seconds passed between bird impact and water contact and it is estimated that the aircraft did not attain more than 75 to 100 feet in altitude. After the second impact the pilot went to the rear of the

aircraft to release the emergency exit and see if the stewardess was uninjured. The airplane settling in the water apparently exerted some pressure inside and it was impossible to open the right cabin emergency exit. One pilot succeeded in opening the pilot's left window with the fire extinguisher. The other pilot opened the left cabin exit. A small private boat picked up the crew as the aircraft was settling in the water. Approximately the nose cone area remained above the water level. The crew returned to the airport and there were no injuries. The aircraft floated approximately 5 to 10 minutes. No bird dispersing method or system of any kind exists at the airport.

In conclusion, the advisory comment "birds on end of runway," "bird activity" is a caution remark and denoted no extreme hazard to the crew. It has been given routinely to hundreds of departing pilots at Lakefront. The mass of birds that must have been on the runway that would allow an aircraft to strike 314 birds to me denotes an extreme hazard. When an aircraft is cleared to take-off, the pilot has every right to assume that there are no other aircraft on the runway, that there are no people on that runway or that there are not one thousand birds on the runway. In my estimation the runway should have been closed for departing jet traffic. With that many birds, the runway could never have been considered safe. It would have been helpful if some official survival assistance could have been available from the airport. The Coast Guard apparently does not have direct contact with the tower and it was sometime before they arrived at the submerged aircraft.

/s/ W. P. FLOWER
W. P. Flower

/s/ CHARLES E. DIRCK
C. DIRCK
C. Dirck

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**Plaintiffs' Supplemental Answer to Interrogatory No. 1 of
Defendant City of Cleveland**

[Filed November 25, 1969]

1. EJA was incorporated in Delaware on May 21, 1964; its principal place of business is Port Columbus International Airport, Columbus, Ohio; it is engaged in the business of flying contract and charter flights. EJS was incorporated in Delaware on November 30, 1964; its principal place of business is the same as for EJA; and it is engaged in the business of owning, selling and leasing jet aircraft.

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**Motion of Defendants City of Cleveland and Phillip A. Schwenz
To Dismiss for Lack of Jurisdiction**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Title omitted in printing]

[Filed January 22, 1970]

Now come The City of Cleveland and Phillip A. Schwenz, defendants herein, and move the Court for an order pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure dismissing this action for lack of jurisdiction of the subject matter on the ground that there is no issue as to any material fact relating to the jurisdiction of this Court and on the undisputed facts this action does not arise under the Constitution, laws or treaties of the United States, there is no diversity of citizenship since all parties to the action are citizens of the State of Ohio and the action does not lie within the admiralty or maritime jurisdiction of the Court.

Defendants request an oral hearing with respect to the foregoing motion.

[Signatures and Certificate of Service
Omitted in Printing]

**Motion of Defendant Howard E. Dicken To Dismiss for
Lack of Jurisdiction**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Title omitted in printing]

[Filed February 17, 1970]

Sirs:

PLEASE TAKE NOTICE that pursuant to Rule 12(b) and Rule 12(h)(3) of the Federal Rules of Civil Procedure the undersigned will move this Court, on behalf of defendant H. E. Dicken, for an order dismissing the complaint herein as to said defendant on the ground that the complaint fails to state a claim upon which relief can be granted and that the court lacks jurisdiction of the subject matter, and for such other, further and different relief as to the court may seem just and proper.

[Signatures and Certificate of Service
Omitted in Printing]

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Excerpts From Deposition of Edward J. McAvoy

[Filed March 4, 1970]

By Mr. Bostwick:

[26] Q. Was there anything in particular that you—any particular reason you got out at the halfway point of runway 6L-2R? A. Yes, sir. I took some pictures of the runway at that time.

Q. Was there anything on the runway? A. Yes, sir. There were dead sea gulls.

[27] Q. Did you count the sea gulls at that time? A. Not as such, no, sir.

Q. During this 10 minutes you just took some photos at that point? A. Yes, sir.

Q. Can you approximate for us how many sea gulls you saw dead on the runway? A. No, sir. I didn't even attempt to approximate it. There was a man out there in a three-quarter ton truck, an open-back truck, who was in the process of picking up the birds.

Q. The birds were actually being picked up when you arrived? A. Yes, sir, they were in the process of clearing the runway.

Q. Do you know who he was? A. No, sir, just a City employee.

Q. Did you give any instructions that nothing should be touched on the runway until you could make some official investigation and photographs? A. No, sir. I had taken my photographs, and I requested this gentleman to give me as close a count as possible as to the number of birds he picked up.

Q. At that time that you were out there in the truck? A. Yes, sir.

Q. You instructed this man to not only pick them up, but count them? A. I had not instructed him to pick them up, sir. I instructed him to give me a count of the birds he

did pick up. He had been dispatched prior to my arrival to pick up the birds.

[31] Q. Did someone give you a bird count of these dead birds? A. Yes.

Mr. Crocker: I will object. This calls for hearsay information.

Mr. Bostwick: It has been noted for the record.

You can go ahead and answer.

The Witness: A. Yes, sir.

Q. And what was that?

Mr. Crocker: Objection. It calls for hearsay information.

Mr. Bostwick: It has been noted.

Go ahead and answer.

The Witness: A. 314.

[32] Q. Mr. McAvoy, handing you what the court reporter has marked here as Plaintiff's Exhibit No. 4 for identification, can you tell us what that is, please?

The Witness: A. That is a sketch of Burke Lakefront Airport with some notations made by myself.

[35] Q. All right, Plaintiff's Exhibit 16 for identification. A. Plaintiff's Exhibit 16 is a narrative statement dated July 29th, by Howard Dicken.

That would be number 46 in the lower lefthand corner.

This is representative of the statement in the package.

Q. I would like to ask about Plaintiff's Exhibit 16.

In the course of your aircraft accident investigation, did you ask for or receive any other narrative statements or signed statements by Howard E. Dicken, other than this Plaintiff's Exhibit 16 which you got on September 11th? A. No, sir.

Q. Plaintiff's Exhibit 17 is next. A. Plaintiff's Exhibit

17 is a narrative statement dated July 29th, by Paul Guinaugh.

[36] The penciled number 47 is in the lower lefthand corner.

This is representative of the one in the package received.

Q. I would just like to ask you whether in the course of your accident investigation you asked for or received any other statements from Mr. Guinaugh, other than Plaintiff's Exhibit 17? A. No, sir.

Q. Plaintiff's 18 is next. A. Plaintiff's Exhibit 18 is a narrative statement dated July 29, 1968, by Fernwood Markle.

The penciled number 48 is in the lower lefthand corner.

This is representative of the statement in the package.

Q. Did you ask for or receive any additional statement from Mr. Markle in your accident investigation? A. No, sir.

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[40] Q. On Plaintiff's 4, this chart of the airport that you have described and testified that you made the marks on, there is a spot that says "impact point" with an arrow drawn there. Did you make that mark and those words, "impact point"? A. Yes, sir.

Q. And it says "7,260 feet" to that point. Is that your marking? A. That is my measurement, yes, sir.

Q. Tell me what that number has reference to with regard to the impact point. A. That is the distance that I saw the buoy from the end of the runway.

Q. And how did you ascertain that the buoy was 7,260 feet from—well, which end of the runway? A. From the threshold of 6 left.

Q. The take-off end of 6 left; is that right? A. Yes, sir.

Q. How did you ascertain that fact? A. I had a City map of the area with measurements on it.

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[43] Q. Page three of your report has two boxes under "name of nearest airport, approximate distance, and compass heading." "Compass Heading" says "230."

Would that mean that a reciprocal back from the impact point to the airport would be a reciprocal of 050 or 230? A. Yes.

Q. And did you make this entry distance—it says "1/5 SM." What does that mean? A. The intent was to designate one-fifth of a statute mile.

Q. Was that your actual estimate there, one-fifth of a statute mile? A. Yes, sir.

Q. Can you describe for me what that measurement is from? It is from the impact point, I take it. But to where?

Mr. Crocker: I object to your keeping referring to the "impact point."

This witness has said time and time again he doesn't know what the impact point was.

Mr. Bostwick: I'm referring to the words on Plaintiff's 4, quote, impact point, close quote.

Mr. Crocker: I object to that reference on Exhibit 4. I don't think that is proper or admissible in this case.

Mr. Bostwick: Go ahead. Can you tell me what the one-[44] fifth of a statute mile is a measurement of, where it starts, and where it ends?

The Witness: A. This should designate the distance, direction, and closest airport boundary.

Q. Are the airport boundaries at Burke Lakefront depicted on Plaintiff's 4? A. Not clearly, no, sir.

Q. Are you able to tell us, for example, where the nearest airport boundary to what you marked as "EMA-9" is? Can you show us an airport boundary that is closest to "EMA-9"? A. Not on the Exhibit, no, sir.

Q. How did you ascertain the airport boundary for your measurement? A. By a cyclone fence.

Q. And how did you measure this one-fifth of a statute mile? A. Off the engineering map that I had access to.

Q. Was it gridded in some way for distance? A. It had

a running footage along the lakefront that I was able to arrive at a 7,260 foot figure.

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Q. Handing you what the court reporter has marked as Plaintiff's 37, Mr. McAvoy, can you identify that photograph for us, please?

The Witness: A. Yes, sir.

Q. What is it? A. This is the cyclone fence that marked the eastern edge of the airport proper.

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[45] Q. Does Plaintiff's 37, is that a fair representation of what you saw Sunday night when you viewed the cyclone fence on July 28th? A. Yes, sir.

• • • • •

[46] Q. In the course of your accident investigation did you attempt to ascertain the flight path of this aircraft from the time of take-off to the time of impact?

The Witness: A. Yes, sir.

Q. And what did you do to try to ascertain that fact? A. There were three objects I used as a reference point.

Q. What were they? A. One of the objects had been moved, so it was of no value.

There was a point on the runway, taxiway C. There was a fence that had been described as struck by the aircraft.

Q. Who did that describing? A. Initially, I first heard the statement from the tower personnel.

Q. Do you remember which one? A. No, sir.

Q. Or the persons? A. No, sir.

Q. When you say "tower personnel," is that the same group as those three Air Traffic Control Specialists that you referred to? A. Yes.

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[47] Q. Was this your method of determining the flight path of the aircraft prior to impact? A. Yes, sir.

Q. And is that depicted by this dotted line on Plaintiff's 4? A. Approximately, yes, sir.

Q. Does the dotted line on Plaintiff's 4, would it run through this broken part of the fence? A. Yes, sir.

.
[50] Q. Could you estimate the depth of the water at the "EMA-10"? That is on Plaintiff's 36. A. If I remember, skin divers who were in the salvage operation business estimated the depth of the water at—between 40 and 45 feet.

Mr. Crocker: I object to the answer, and ask that it be stricken as being hearsay.

Mr. Bostwick: Q. Were the skin divers working at this spot that you have marked as "EMA-10"?

The Witness: A. Yes.

Q. And what day was that? A. July 30th, sir.

Q. That would have been Tuesday after the accident on Sunday? A. Tuesday.

Q. To your knowledge was the aircraft moved at all during Monday, July 29th, from the spot you have marked at "EMA-10"? A. Not to my knowledge, no, sir.

.
[52] Q. Handing you what the reporter has marked as Plaintiff's Exhibit 42 for identification, I would like to ask you to identify that upper photograph in that document, please.

The Witness: A. This is a photograph I took.

Q. What is it a photograph of? A. It is a picture of a row of vehicles.

Q. Do you remember when you took it? A. No, sir.

Q. Do you think it might have been when you were out there Monday morning and took the pictures from the threshold shown on Exhibit 3? A. Perhaps.

Q. Do I understand that the location of that photograph is out there somewhere between the end of runway 6L and the water's edge? A. Between?

Q. Well, you described that as a row of vehicles. Can you tell us where that photograph was taken. A. It is in the area northeast of the departure end of runway 6 left.

Q. Does it fairly represent what you saw that morning with regard to those vehicles? A. Yes, sir.

Q. In that upper photo this truck that has the damage to it on the top, did you ascertain in the course of your accident investigation that that truck had been damaged by the aircraft that crashed there, N367EJ? A. It was reported to me that that is what occurred, yes, sir.

Q. What told you that; do you remember? A. No, sir.

Q. In the course of your accident investigation did you ascertain whether the position of the truck as we see it in the upper photo, Plaintiff's 42, is where the truck was located when it was struck by the airplane? A. Will you rephrase that?

Q. I will be glad to. In the course of your accident investigation did you learn whether the position of the truck as it is shown here in this upper photograph of Plaintiff's 42 is the same position that the truck was in at the time it was struck by the airplane? A. It was not reported in that position.

Q. What information was given to you about its position at the time it was struck by the airplane? A. It was reported that the truck was adjacent to the cyclone fence.

Q. And is there a place in this upper photograph of Exhibit 43 that you could point to to depict where the truck was at the time it was struck?

Mr. Crocker: Based on what someone else told him?

Mr. Bostwick: Yes.

The Witness: A. As reported to me, sir, it was directly easterly of the row of vehicles, in this position here (indicating).

• • • • •

Q. Mark that "EMA-12." A. (Marking Exhibit.)

Q. That descriptive phrase below that upper photograph

on Plaintiff's 42, is that a phrase that you wrote? A. Yes, sir.

Q. Did the aircraft stay submerged in the water all day July 28th at this point that you have marked on Exhibit 36 as "EMA-10"? A. To the best of my knowledge, yes, sir.

Q. When did salvage operations start? A. Either the 30th or 31st, July.

Q. That would be either Tuesday or Wednesday? A. Yes, sir.

Q. Do you have any notes in your record that would indicate which of those two dates it was, that would refresh your memory on that? A. I have some newspaper photos with the date of July 30th showing the aircraft being lifted from the lake.

Q. July 30th is Tuesday; right? A. Yes, sir.

[58] Q. Would you describe for us the nature of your exterior inspection on the aircraft with regard to the damage of the aircraft? Can you describe for us what you saw when you observed the aircraft, insofar as the damage done to it? A. Yes, sir.

[59] Q. Will you go ahead with your answer?

The Witness: A. Examination of both engines, I recorded there was a dent in the nose cone position.

The guide veins were damaged to a slight degree.

Mr. Zimmermann: Again may I insist that you specify what it was that you observed, rather than using the term "damage."

Mr. Bostwick: I think that is what he did. He saw the guide veins damaged to a slight degree.

Mr. Zimmermann: Can he describe the slight degree of whatever he saw, whatever part of it he saw that was dented, bent, torn, or whatever?

Mr. Bostwick: Do you want to go ahead with your answer? Try to keep your voice up for the court reporter.

The Witness: In that lines were not in their normal configuration.

Q. What did you observe with regard to their abnormal configuration? A. They were bent.

Q. Tell us how they were bent, what you observed with regard to them being bent. A. The guide veins were bent to various angles.

Q. Were there any other observations with regard to the engines? A. The first stage compressor rotator blades were bent.

[60] Q. Were there any other observations with regard to the engines? You can go right ahead, if you like, with all of your observations that you have recorded either there, or that you remember. A. The first stage stator blades, and second stage rotor blades were bent and torn.

Q. Do you want me to say "go ahead" between each one? A. No, sir.

Q. I will be glad to.

Mr. Zimmermann: Off the record.

(Discussion off the record.)

The Witness: The compressor area of the jet engine was filled with bird debris. By visual examination of the engine I saw a percentage of the fan rotor secondary air files were missing. The blades that were not missing, that were present, were bent and ripped.

The exit guide veins leading edges had bends and tears.

Examination of the starboard engine, I saw three dents in the nose cone.

The guide vein was missing at the 2:00 o'clock position. The guide vein was wedged between the first stage rotor and first stage stator blades at the 5:00 o'clock position.

The first stage stator blades were damaged—were out of configuration because of their proximity to the first stage rotor blades.

All the visible compressor rotor blades that I saw had extensive bending and metal tearing.

In the forward area of this engine I saw bird debris.

In my aft view of the engine 75 per cent of the fan rotor secondary air files were missing. The remaining blades were bent and torn.

One exit guide vein was missing. The guide veins that were present were bent and torn.

Q. Aside from the engines, did you make any observations on the outside of the aircraft? A. Yes, sir.

Q. Would you describe those for us, please. A. All components of the aircraft were examined.

[61] Q. Could you describe what you saw with regard to those components? A. Both wings were not in their normal configuration.

Q. Can you describe the configuration they were in? A. The metal was dented and torn and displaced in many instances.

Q. What about the fuselage? A. The fuselage contained severe bending.

Q. Can you describe where the bending was? Would you point to it on one of those photographs, and mark it with a ballpoint? A. It is not clearly visible on this one photograph. There is just one evidence of cabin damage here.

Q. Do you want to mark that out, please? A. (Marking Exhibit.)

Q. Mark that "EMA-14." A. (Marking Exhibit.)

Q. Was there any other bending of the fuselage? A. Yes, sir.

Q. Will you point that out with another arrow? A. I can't see it on this photograph.

Q. Can you describe where it was? A. Approximately the mid-portion, mid-top portion of the cabin, and also on the underside of the fuselage.

Q. Are there any other observations with regard to the fuselage? A. (Inaudible.)

Q. I'm sorry, I didn't hear that. A. Pertaining to what, specifically?

Q. I don't want to lead you. I just wanted to know if there were any other observations with regard to the fuselage, other than what you have just stated? A. There was extensive damage—I'm sorry. After 200 reports where I have been using the word consistently, it is hard to eliminate it from my vocabulary.

Q. I don't think it needs to be eliminated. If you say you saw damage, describe what damage you saw.

Mr. Zimmermann: I'm instructing the witness to confine himself to what he actually observed.

The Witness: A. There was an extensive area at the root of the port wing that exposed the interior construction of the fuselage.

[62] Q. Is that portion of the root of the port wing shown in any of these photographs? A. Yes, sir.

Q. Could you put an arrow to that. A. (Marking Exhibit.) It is right here.

Q. That will be "EMA-15," I believe. A. (Marking Exhibit.)

Q. Do you want to continue with your observations? A. There was a similar area on the starboard side at the wing root trailing edge.

Q. Is that depicted in any of these photographs? A. Yes, sir.

Q. Would you put an arrow to that, please?

I guess we ought to note for the record that "EMA-15" was drawn on the lower photograph of Plaintiff's Exhibit No. 45. A. (Marking Exhibit.)

Q. You are now drawing on the photograph in Exhibit 44. Mark that "EMA-16." A. (Marking Exhibit.)

Q. Go ahead, please. A. Interior examination of the aircraft revealed intensive water soaking.

Q. Did you take a photograph of the interior? A. No, sir.

Q. Go ahead. A. I have about concluded my examination.

Q. What about the empennage at the tail section, did you make any observation with regard to that? A. Yes, sir.

Q. Could you describe those for us? A. I do not recall any visible markings on the exterior of the empennage area.

Q. Have we covered all of your observations at this time and place when you observed both the exterior and the interior of the aircraft? A. I would like to correct myself.

Q. Okay, go ahead. A. I noted some marks on the horizontal stabilizer, the elevators, and the vertical fins.

Q. Could you describe the marks? A. Metal dent-type marks.

Q. Are they shown in any of the photographs that we have here? A. No, sir, they are not visible.

Q. Is there anything else that you see in your report that refreshes your memory about your observations that day after they brought the aircraft out of the water? A. Say that again.

Q. Is there anything else there in your report that refreshes your memory about the observations you made of the aircraft after they brought it out of the water, other than what we have discussed? A. Aircraft systems.

Q. Could you describe what you observed with regard to the aircraft systems? A. The fuel system, as a result—I will correct that. The fuel system was not capable of normal operation because it was deformed by some external source.

Q. Can you just tell us how it was deformed? A. No, sir.

Q. Was it caved in, or ripped open, or any descriptive words that you have. A. It was severely bent.

Q. That is not shown in any of these photographs, is it? A. No, sir.

Q. Is there anything else with regard to the aircraft systems? A. All of the electrical wiring examined was water soaked. The hydraulic systems were bent and deformed. The anti-ice system, which is an electrical system, had external damage and was water soaked.

Q. When you say it was "damaged" was it torn open or bent? Can you describe it? A. Bent and distorted.

Q. Is there anything else with regard to the aircraft systems? A. No, sir.

Q. Are there any other major observations of the aircraft, inside or out? A. We observed that all of the seats of the aircraft were water soaked.

Q. Is that about it? A. Yes, sir.

Q. Was there ever a tear-down of either one or both of these jet engines, so far as your accident investigation was concerned? A. No, sir.

• • • • •

By Mr. Crocker:

Q. Now you testified that you talked with Howard E. Dicken, who was a Watch Supervisor in the tower cab; is that true? A. Yes, sir.

Q. And you told us that you asked him if he had been on [64] duty at the time of the accident, and he told you that he had; is that right? A. Yes, sir.

Q. And you asked him about his observations of the accident; is that right? A. Yes, sir.

Q. He told you that the plane had taken off and had encountered a flock of birds; is that correct? A. Basically, yes.

Q. Did you ask Mr. Dicken whether or not he was the one who had issued the take-off clearance to this particular plane? A. This question was asked of Mr. Dicken, yes, sir.

Q. And he told you that he was the man that had done that? A. Yes, sir.

Q. And he also told you that he had warned the pilot about the presence of sea gulls on the runway; didn't he tell you that?

Mr. Bostwick: I object to the form.

The Witness: A. He stated the manner in which he issued the Advisory to the aircraft, yes, sir.

Mr. Crocker: Q. And what else did he tell you? A. He stated that he assumed control of the aircraft as the aircraft departed the ramp area. He was instructed to contact the air control portion of the tower.

Q. The pilot was instructed, you mean? A. By the ground control, prior to his crossing 6 left—6 right. When the

pilot arrived at 6 right, he switched frequency and contacted the air control portion in the tower cab.

Q. Which portion was Mr. Dicken operating; did he tell you that? A. Yes, sir.

Q. Which? A. He designated it as local control. To clarify, it was the airborne portion of the control.

Q. Didn't Mr. Dicken tell you that the pilot had been told, before he commenced his take-off, that there were sea gulls on the runway, and that there was a million of them there?

Mr. Bostwick: I object to the form.

The Witness: A. Mr. Dicken stated that he issued this bird Advisory.

[65] Mr. Crocker: Q. What did he say he told the pilot? A. He told me that he advised the pilot that he was cleared for a take-off, there were birds on the runway, and he stated that he added the phrase "there are millions of them."

Q. "There are a million of them"? A. "Millions."

Q. "Millions" plural of them? A. Plural.

Q. Did he tell you whether he had an acknowledgement of that clearance from the pilot? A. It was not discussed as such, no, sir.

Q. You didn't ask him that? A. Mr. Dicken stated that he re-issued that take-off instruction to the aircraft when requested to do so by the pilot.

Q. I say, did you ask Mr. Dicken whether or not he had received an acknowledgement of this Advisory that he gave the pilot? A. I questioned Mr. Dicken if the pilot had acknowledged the receipt of the bird Advisory.

Q. And what did he say? A. He said "No."

Q. He said the pilot had not acknowledged it? A. He said the pilot had recommunicated with him after the Advisory was issued, and he requested clarification of take-off instructions.

Q. And what did he do then? A. He re-issued take-off instructions to the pilot.

Q. With the bird Advisory? A. Not with the bird Advisory, no, sir.

Q. Not with the bird Advisory? Is that what Mr. Dicken told you? A. Yes, sir.

.

[66] Q. Now what did these two men, other than Mr. Dicken, who were in the tower cab at the time of the accident, what did they tell you about the clearance that was issued to the pilot, what instructions were issued to him? A. I recall speaking to one other person in the tower who stated that he had communicated with the aircraft.

Q. Who was that? A. I believe that was Mister—I will not quote the name, sir. It is the man who initially issued taxi instructions to the aircraft after engine start.

Q. You are not sure of his name? A. I'm not sure, no, sir.

Q. And what did he say he had said to the pilot, and what the pilot said to him? A. He said when he was contacted by the aircraft, he issued taxi instructions to the aircraft for take-off, to take-off position.

Q. Now did you question these other two men who had been in the tower cab at the time of the take-off, other than Dicken, as to whether they had overheard the communication Dicken had with the pilot? Did you question them about that? A. That was discussed, yes, sir.

Q. And what did they tell you about that? A. I cannot say that, sir, because one of the other men was not present at the time of the accident. He was coming on duty at that time.

Q. Well, what did the men that were in the tower cab at the time of the accident, what did they tell you that [67] they had overheard in the way of communications between Mr. Dicken and the pilot? A. One of the men I questioned stated that he heard Mr. Dicken issue take-off instructions and bird Advisory to the aircraft.

Q. And did he confirm that Mr. Dicken, in addition to telling the pilots that there were birds on the runway, had added the phrase "there are millions of them?" Did he confirm that? A. I would have to refresh my memory.

Q. Well, refresh your recollection. A. Yes, sir.

Q. What did he say? A. The gentleman I spoke to confirmed that he heard Mr. Dicken use the terminology "millions."

Q. But was that Mr. Fernwood Markle? A. I don't know, sir. He did not have a nameplate on him, and I was—

Q. Well, would you look at Plaintiff's Exhibit 18 for identification, which is page number 48, and tell us whether or not that refreshes your collection that Mr. Markle told you when you talked with him that he overheard Mr. Dicken advise the pilot of this Falcon aircraft that there were gulls on the runway, and he added the phrase, quote, "It looks like there are a million of them," close quote. Does that refresh your recollection? A. Perhaps I wasn't clear. There were only two personnel in the tower when I questioned these people about the conditions that existed at the time of take-off. The other person who was there at the time was not present at the time of my questioning.

Q. Did you ever talk to this third person who wasn't present? A. Yes, sir.

Q. And when did you talk to him? A. At a later date.

Q. And who was that; do you know? A. I got statements from all three persons at a later date.

Q. I appreciate that. They are the statements that have been marked here as Plaintiff's Exhibits 16, 17, and 18. That is true, isn't it? A. Yes, sir.

Q. But what I'm trying to find out about now is when you talked first to the people in the tower there were only two men there who had been there at the time of the accident? A. That's correct.

[68] Q. One of them was Dicken. A. Yes, sir.

Q. And who was the other one? A. I don't know, sir.

Q. Well, it would have to have been either Markle or Guinaugh; is that right? A. Yes, sir.

Q. And the third one then you talked to at a later date? A. That's correct.

Q. When you talked with Mr. Markle then either in the tower, or at a later date, did he confirm the fact that he had overheard Mr. Dicken advise the pilot of this Falcon aircraft that there were sea gulls on the runway, and that he added the phrase, "it looks like there are a million of them"? A. I don't—he did not ever use the words "sea gulls on the runway," sir. I think the terminology was "birds."

Q. Well then, did he confirm the fact that he had overheard Mr. Dicken warn the pilot about birds on the runway? A. Yes, sir.

Q. And that he had overheard Mr. Dicken add the phrase, "it looks like there are a million of them"? A. Yes, sir.

Q. Now what about Mr. Guinaugh, when you talked with him either in the tower, if you talked with him in the tower, or later, whenever it was that you talked with him, did he confirm that he had overheard the same discussion between Mr. Dicken and the pilot? A. Yes, sir.

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Q. You told us about the aircraft being raised out of the water by this floating derrick, I guess you might call it, and being dropped back in. Was that dropped intentionally, or was it done inadvertently? A. Inadvertently.

Q. Inadvertently? And you aren't able to tell us the reason why it dropped back? In other words did the sling break, or the boom collapse? What did you see happen? A. I saw the attaching line release, and the aircraft drop back in.

Q. What do you mean? Was there some sort of a sling that went around the fuselage? A. They had either a sling around the fuselage and discarded that and used the [69] attach points, or they were using the attach points, and discarded that and used the sling.

Q. But was it the sling that went around that you think that broke that caused the plane to drop back in? A. There was no sling on the aircraft when it dropped in, sir.

Q. Were they using the attach points? A. The lift attach points.

Q. Did the attach points break, or was it part of the rigging that broke? A. The thing that they had put on the hoist. This is a lift-type device for the Falcon aircraft was put on—the failure occurred in the lifting device.

Q. There is a special rig of some sort that is used to lift the aircraft? A. Yes, sir.

Q. And that it was attached to the attach points on the aircraft, and the rigging from the derrick was attached to that piece? A. Yes, sir.

Q. And it was this particular rig or fixture, the lift fixture, if we can call it that, that broke? A. Yes, sir.

Q. Who supplied that; do you know? A. If I recall correctly, it was the Falcon people.

Q. The people from the Falcon Company that were there? A. Yes, sir.

Q. And after that broke, then there was a different method used to rig the derrick to the plane to lift it out of the water; is that true? A. If I recall correctly, then they used the wrap-around sling on the aircraft to lift it.

Q. And did you observe what, if any, deformation, bending, or tearing was done to the airplane by that wrap-around sling that they used? A. I saw crinkling in the cabin fuselage in the sling area.

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**Plaintiffs' Exhibit 16 Marked for Identification in
McAvoy Deposition**

**AIR TRAFFIC CONTROL TOWER
BURKE LAKEFRONT AIRPORT
CLEVELAND, OHIO 44114**

July 29, 1968

NARRATIVE STATEMENT

The following is a report concerning the accident to aircraft FFJ-N367EJ at Cleveland, Ohio, Burke Lakefront Airport, July 28, 1968, at 1543 GMT.

My name is Howard E. Dicken, my address is 23225-Cedar Point Road, Cleveland, Ohio 44142. I am employed as an Air Traffic Control Specialist by Federal Aviation Administration at Burke Lakefront Tower, Cleveland, Ohio.

During the period 1100 GMT to 1900 GMT, I was Watch Supervisor. At the time of the accident, I was working local control position.

FFJ-N367EJ was holding short of runway 6R. Pilot requested take off instruction. I cleared N367EJ to cross 6R, without delay. Traffic PA-24-N4723L, one mile on final for runway 6R. N367EJ crossed 6R and was cleared for take off on six left. I advised the pilot of numerous seagulls on the runway. Then I added, "It looks like a million of them." N367EJ started take off becoming airborne approximately 3000 feet from approach end of runway 6L. At about this time the seagulls started to rise in front of the aircraft. The aircraft was approximately 100 feet in the air when it hit the seagulls. I saw the engines smoking, and the aircraft began to settle back to the runway. At this time the aircraft made a slight left turn ending up in the water about 200 feet off short.

/s/ Howard E. Dicken
HOWARD E. DICKEN
Burke Lakefront Tower
Cleveland, Ohio

**Plaintiffs' Exhibit 17 Marked for Identification in
McAvoy Deposition**

**AIR TRAFFIC CONTROL TOWER
BURKE LAKEFRONT AIRPORT
CLEVELAND, OHIO 44114**

July 29, 1968

NARRATIVE STATEMENT

The following is a report concerning the accident to aircraft FFJ-N367EJ at Cleveland, Ohio, Burke Lakefront Airport, July 28, 1968, at 1543 GMT.

My name is Paul L. Guinaugh, my address is 20400 Albion Road, Strongsville, Ohio. I am employed as an Air Traffic Control Specialist by Federal Aviation Administration at Burke Lakefront Tower, Cleveland, Ohio.

During the period 1100 GMT and 1400 GMT, while working Local Control position, I requested City Operations to conduct a check of an unusually large flock of seagulls observed in the vicinity of Runway 6L/24R. City Agent William Pfarr completed an inspection of the area and inquired if I thought a NOTAM should be sent in connection with the seagull activity—I replied that a NOTAM should be sent. As a result, an Airman Advisory (AIRAD) was forwarded to the Cleveland FSS regarding "numerous seagulls in the vicinity of runway 6L/24R" effective 1313 GMT.

At approximately 1535 GMT, while working Ground Control, N367EJ-FFJ requested taxi clearance for take off. I cleared N367EJ-FFJ to Runway 6 and instructed the aircraft to hold short of Runway 6R and to contact the tower on 120.9 MHE when ready for take off.

After hearing local Control advise the jet that there were a million seagulls on the runway, I observed N367EJ-FFJ taking off and striking a flock of birds shortly after the aircraft became airborne. I saw smoke trailing from

the aircraft as it veered left toward the water coming to a stop about 200 feet to the left side of the runway.

/s/ Paul L. Guinaugh
PAUL L. GUINAUGH
Burke Lakefront Tower
Cleveland, Ohio

**Plaintiffs' Exhibit 18 Marked for Identification in
McAvoy Deposition**

AIR TRAFFIC CONTROL TOWER
BURKE LAKEFRONT AIRPORT
CLEVELAND, OHIO 44114

July 29, 1968

NARRATIVE STATEMENT

The following is a report concerning the accident to aircraft FFJ-N367EJ at Cleveland, Ohio, Burke Lakefront Airport, July 28, 1968, at 1543 GMT.

My name is Fernwood Marke, my address is 34099 Detroit Road, Avon, Ohio. I am employed as an Air Traffic Control Specialist by Federal Aviation Administration at Burke Lakefront Tower, Cleveland, Ohio.

While working Flight Data, I heard the local controller clear FFJ-N367EJ for take off on runway 6L. He advised the pilot of the aircraft that there were seagulls on the runway, then he added "It looks like there are a million of them." I observed the aircraft starting its take off roll and striking numerous seagulls rising from the runway as the aircraft became airborne. I observed smoke trailing from the aircraft engines. The aircraft veered to the left and headed for the water and came to rest in the water about 200 feet off shore.

/s/ Fernwood Markle
FERNWOOD MARKLE
Burke Lakefront Tower
Cleveland, Ohio

**Opinion of the United States Court of Appeals
for the Sixth Circuit**

[Filed August 24, 1971]

Printed in Petition for Certiorari, Appendix A, pp. 1a-26a.

**Opinion of the United States District Court for the Northern
District of Ohio, Eastern Division**

[Filed June 12, 1970]

Printed in Petition for Certiorari, Appendix B, pp. 27a-42a.

Supreme Court of the United States

No. 71-678 ~~Excluded from~~ 12

Executive Jet Aviation, Inc., et al.,

Petitioners,

v.

City of Cleveland, Ohio, et al.

ORDER ALLOWING CERTIORARI. Filed February 22 -----, 1972.

**The petition herein for a writ of certiorari to the United States Court of
appeals for the Sixth ----- Circuit is granted.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No.

EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners*

v.

CITY OF CLEVELAND, OHIO, ET AL., *Respondents*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioners Executive Jet Aviation, Inc. and Executive Jet Sales, Inc.¹ respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 24, 1971.

OPINIONS BELOW

The opinion of the court of appeals, reported at 448 F. 2d 151, appears in the Appendix hereto (App. A, *infra*, pp. 1a-26a). The unreported opinion of the district court also appears in the Appendix hereto (App. B, *infra*, pp. 27a-42a).

¹ Hereinafter petitioners will be referred to collectively as "EJA."

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 24, 1971. On September 14, 1971, EJA filed with the court of appeals a suggestion of a party for rehearing in banc and a motion to enlarge time for filing such a suggestion. On October 18, 1971, the court of appeals entered an order granting EJA's motion. As of the date of filing this petition, no action has been taken by the court of appeals on EJA's suggestion for a rehearing in banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

EJA adopts the following statement from Circuit Judge Edwards' dissenting opinion written in this case:

This case presents a single important question:

Do the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash is alleged to be tortious conduct which occurred on land? (App. A, *infra*, p. 8a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONST. art. III:

§ 2. *Jurisdiction of Courts*

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . .

United States Code (U.S.C.), Title 28:

§ 1333. *Admiralty, maritime and prize cases*

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

- (1) Any civil case of admiralty or maritime jurisdiction. . . .

STATEMENT OF THE CASE

On July 28, 1968, a corporate jet aircraft known as a Falcon Mystere M-20, Registration N367EJ (hereinafter referred to as the Falcon), owned by petitioner Executive Jet Sales, Inc. and operated by petitioner Executive Jet Aviation, Inc. crashed in the navigable waters of Lake Erie after striking several hundred seagulls shortly after takeoff from Burke Lakefront Airport at Cleveland, Ohio (hereinafter referred to as the airport). The airport is owned, operated and maintained by respondent the City of Cleveland, Ohio, and at the time of the crash respondent Phillip A. Schwenz² was employed by the City as manager of the airport and was acting in the scope and course of his employment (R. 4, 9).³ Respondent Howard E. Dicken was employed by the United States Federal Aviation Administration (FAA) at the time of the crash and was acting in the scope of his employment as an Air Traffic Controller when he issued a clearance from the airport tower to the Falcon for takeoff (R. 4, 7).

What happened at the time of this crash is succinctly stated by the two pilots flying the Falcon in a statement given by them two days after the accident to the National Transportation Safety Board during the course of the official investigation of this accident (R. 18-20). That statement reads:

² Hereinafter appellees the City of Cleveland, Ohio, and Phillip A. Schwenz will be referred to collectively as "the City."

³ Record citations refer to pages in the printed Appendix to the Briefs filed in the court of appeals which, together with the Appendix of Photographic Exhibits, was certified and transmitted as the record in this case.

STATEMENT OF WITNESS

July 30, 1968

Pilot Statement: W. P. Flower, P/C
C. Dirck, C/P

The Aircraft—EJ 367—arrived at Burke Lakefront July 26 approximately 1600 hours. It was immediately refueled by Remmert-Warner, secured and the crew departed to the motel. The crew consisted of W. P. Flower, P/C, C. Dirck, C/P, and Miss J. Vargo, Hostess.

On the 28th at approximately 1000 hours, the crew arrived at Lakefront for a ferry flight to Portland, Maine, picking up passengers and continuing to White Plains, N. Y. The aircraft was uncovered and preflighted by the First officer. The Hostess made a final inspection of the cabin in preparation for picking up passengers and the Captain obtained the weather, filed a flight plan, and obtained a release from the Company dispatcher. After engine start we received clearance to taxi to Runway 6 Left. As the flight was non-revenue it is company policy for the first officer to fly in the left seat for proficiency and training. The first officer was flying from the left seat, the captain in the right seat, and the Hostess was seated in the first seat on the right side facing aft.

The check list was completed and on taxiing out, it was noted that one aircraft was on landing rollout on 6 Left, and ground advised an aircraft was on the approach to 6 Right. The ground advised to expedite across 6 Right. At this point there were, to my knowledge, no advisories regarding birds from ground control. In obtaining the weather by phone for Cleveland, Portland, and White Plains, there was no information given regarding birds as would appear on the end of the Cleveland sequence. On instructions, the pilot in

the right seat, switched to tower frequency, and requested take-off. The take-off clearance initially was faded with the final portion of the statement saying something to the effect "Caution, birds *on end of runway.*" These exact remarks can be substantiated by the tower tape. The bird caution to me was a routine advisory as would be given for a few or small number of birds. The transmission did not possess extreme hazard information. As the take-off clearance was not clear a second request was made and a second clearance was issued for take-off. Neither pilot could see the birds on the end of the runway. After clearance to take-off was received the pilot in the left seat executed the take-off and rotated at approximately 125 Kts. The pilot in the right seat made a power check, voiced 30 Kts., 100 Kts., V_1 and rotate. The pilot in the left seat could not distinguish the bird line prior to rotation and in his estimation could not abort the take-off. On rotating a sea of birds on the runway became visible. Approaching the birds at approximately 75 feet caused them to flush and fly into the aircraft, apparently hundreds hitting the belly and engine intakes. Bird impact substantially reduced the air speed an estimated 15 or 20 Kts. The pilot in the left seat raised the gear handle, the pilot in the right seat maneuvered the throttles in an effort to obtain partial power. There was almost immediate total loss of power. The engine temperature indicated above 850 degrees on both engines and the RPM dropped rapidly below 70%. The aircraft flew in a semi-stalled attitude stall horn blowing until contacting the water. The aircraft struck the top of a pick-up truck and a portion of the airport perimeter fence. The aircraft contacted the water in a flat attitude and on a second impact water entered the cabin almost immediately. Only a few seconds passed between bird impact and water contact and it is estimated that the aircraft did not attain more than 75 to

100 feet in altitude. After the second impact the pilot went to the rear of the aircraft to release the emergency exit and see if the stewardess was uninjured. The airplane settling in the water apparently exerted some pressure inside and it was impossible to open the right cabin emergency exit. One pilot succeeded in opening the pilot's left window with the fire extinguisher. The other pilot opened the left cabin exit. A small private boat picked up the crew as the aircraft was settling in the water. Approximately the nose cone area remained above the water level. The crew returned to the airport and there were no injuries. The aircraft floated approximately 5 to 10 minutes. No bird dispersing method or system of any kind exists at the airport.

In conclusion, the advisory comment "birds on end of runway", "bird activity" is a caution remark and denoted no extreme hazard to the crew. It has been given routinely to hundreds of departing pilots at Lakefront. The mass of birds that must have been on the runway that would allow an aircraft to strike 314 birds to me denotes an extreme hazard. When an aircraft is cleared to takeoff, the pilot has every right to assume that there are no other aircraft on the runway, that there are no people on that runway or that there are not one thousand birds on the runway. In my estimation the runway should have been closed for departing jet traffic. With that many birds, the runway could never have been considered safe. It would have been helpful if some official survival assistance could have been available from the airport. The Coast Guard apparently does not have direct contact with the tower and it was sometime before they arrived at the submerged aircraft.

/s/ W. P. FLOWER
W. P. Flower

/s/ CHARLES E. DIRCK
C. Dirck

Official accident investigators later counted 314 dead seagulls on the runway (R. 31). They also determined that the aircraft impacted the water at a point located one-fifth of a statute mile from the cyclone fence which marked the airport boundary (R. 43, 44). The waters of Lake Erie are navigable at that point, their depth being estimated at "between 40 and 45 feet" (R. 49). The Falcon sank completely and remained submerged in Lake Erie for more than two days (R. 50, 54). After it was raised an inspection of the aircraft revealed that, among other things, "the fuselage contained severe bending" (R. 60), and the interior of the aircraft (including all electrical components, radios and instruments) "revealed intensive water soaking" (R. 61).⁴

This action was brought within the admiralty and maritime jurisdiction of the United States District Court for the Northern District of Ohio, Eastern Division, by EJA against the City and respondent Dicken⁵ to recover for the total destruction of EJA's Falcon, for the loss of use of the aircraft for a period reasonably required to obtain a replacement, and for the salvage, raising and other costs incurred (R. 3-6). The complaint seeks damages in the amount of \$1,763,-

⁴ Photographs of the dead birds, the impact point, the cyclone fence and truck struck by the Falcon, the damage to the Falcon and similar matters are shown in the Appendix of Photographic Exhibits.

⁵ EJA also filed an action against Dicken's employer, the United States of America, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. That action, identical to the present action against Dicken except for the jurisdictional basis, is still pending in the United States District Court for the Northern District of Ohio, Eastern Division, as Civil Action No. C69-352.

643.64 (with interest), and contains the following allegations, among others:

7. On or about July 28, 1968, defendant Howard E. Dicken negligently and carelessly supervised and controlled, or failed to supervise and control, plaintiffs' Falcon; and negligently and carelessly failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which defendant Howard E. Dicken knew or should have known, including a huge flock of seagulls which were sitting on the active runway.

8. On and before July 28, 1968, the city and defendant Phillip A. Schwenz, and each of them, negligently and carelessly operated, controlled, maintained, supervised and inspected the airport; negligently and carelessly failed to remove and eliminate hazards to the aircraft existing on, over and adjacent to the airport, including the aforementioned flock of seagulls; and negligently failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which the city and defendant Phillip A. Schwenz knew or should have known, including the aforementioned flock of seagulls.

9. As a result of the aforementioned negligence and carelessness of defendants, and each of them, plaintiffs' Falcon struck several hundred seagulls shortly after take off from the airport when the flock flushed; and *the Falcon was totally destroyed when it crashed and sank into the navigable waters of Lake Erie off shore from the airport, all to plaintiffs' damage. . . .* (R. 4, 5, emphasis added.)

The City impleaded the United States of America seeking non-contractual indemnity (R. 14-17). After all pleadings were at issue (R. 9, 6, 22) and following some initial discovery (R. 25-69), the City filed a

motion pursuant to Rule 12(h)(3) Fed. R. Civ. P. suggesting to the district court that it lacked jurisdiction of the subject matter (R. 21). Dicken joined in the motion (R. 24). On June 12, 1970, the district court granted the City's motion and filed a memorandum and order dismissing EJA's complaint for lack of jurisdiction over the subject matter (R. 73-87). The district court held (1) that the locality of the tort was over land because "the 'impact' of the alleged negligence occurred when the gulls disabled the plane's engines" (App. B, *infra*, pp. 36a-37a); and (2) that there was "no relationship between the 'wrong' alleged in this case and some maritime service, navigation or commerce upon navigable waters" (App. B, *infra*, p. 41a).

EJA appealed the dismissal to the Sixth Circuit under 28 U.S.C. § 1291. By a vote of two-to-one the court of appeals affirmed the judgment below. Chief Judge Phillips, writing for the majority, agreed with the district court's holding that "the alleged tort occurred on land, even though the plane fell into navigable waters . . ." (App. A, *infra*, p. 1a); but found it "not necessary to consider the question of maritime relationship or nexus . . ." (App. A, *infra*, p. 6a). In a seventeen page dissent Circuit Judge Edwards disagreed. He noted that in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963), the Third Circuit held that the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash was alleged to be tortious conduct which occurred on land. He agreed with the Third Circuit's reasoning in *Weinstein* that such cases are within the admiralty jurisdiction because "When an aircraft

crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels" (*Id.* at 763). He felt that this case required the Sixth Circuit to accept or reject *Weinstein*, and concluded that in his view it "should adopt the Third Circuit rule of *Weinstein, supra*" (App. A, *infra*, p. 25a). In a separate concurring opinion Circuit Judge McCree agreed "as a matter of policy, with much of what Judge Edwards has written in support of the view that 'air ships . . . are within the maritime jurisdiction when they crash on navigable waters'" (App. A, *infra*, p. 8a). However, he concluded that the question was "foreclosed" by this Court's opinions in *The Admiral Peoples*, 295 U.S. 649 (1935) and *Minnie v. Port Huron Co.*, 295 U.S. 647 (1935). He therefore joined Chief Judge Phillips in affirming the district court.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Decision in This Case Is in Direct and Irreconcilable Conflict With the Third Circuit's Decision in *Weinstein* on the Same Matter of Federal Law

As Judge Edwards stated in his dissenting opinion, "This case presents a single important question: Do the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash is alleged to be tortious conduct which occurred on land?" (App. A, *infra*, p. 8a). He also noted that the Third Circuit "has previously answered this question affirmatively" in the case of *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963), and reaffirmed their conclusion sitting in banc in the case of *Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir.), *cert. denied*, 393

U.S. 979 (1968). Both cases arose out of the crash of a passenger aircraft into the navigable waters of Boston Harbor shortly after takeoff. In *Weinstein* the Third Circuit said:

The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; i.e., the place where it happened. If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required.

* * *

McGuire [*McGuire v. City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961)] to the contrary notwithstanding, the weight of authority is clearly to the effect that locality alone determines whether or not a claim is within the admiralty jurisdiction. In *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 34 S.Ct. 733 (1914), the Supreme Court expressly rejected the contention that the tort must, in addition to meeting the locality test, have some connection with a vessel.

* * *

Assuming *arguendo* that some kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdiction, we believe nonetheless that the cases at bar are within the admiralty jurisdiction insofar as the tort claims alleged therein are concerned. At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. *Today, aircraft have become a major instrument of travel and commerce over and across these same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels. "There can be noth-*

ing more maritime than the sea." *Pure Oil Co. v. Snipes*, 293 F.2d 60, 65 at n. 6 (5 Cir. 1961).

Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging. 316 F.2d at 761, 763 (emphasis added).

In the present case both the district court and the court of appeals answered this same question in the negative. The district court did not try to distinguish *Weinstein*. It simply concluded that it was bound by the Sixth Circuit's "minority position which requires some maritime nexus," rather than by the Third Circuit's rule (App. B, *infra*, p. 33a). See *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967) and *Gowdy v. United States*, 412 F.2d 525 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969). The court of appeals realized that if it found that the alleged tort occurred over land there was no need to consider the question of maritime nexus. That realization, however, left the court of appeals face to face with the *Weinstein* decision. It resolved the dilemma by "reconciling" the present case with *Weinstein* in the following manner:

As we read that decision [*Weinstein*], the test for admiralty jurisdiction over torts stated at 316 F.2d at 761 produces the same result we have reached when applied to the facts of the present case. (App. A, *infra*, p. 6a, emphasis added).

EJA respectfully submits that the above-quoted statement is erroneous and cannot withstand analysis; and that Judge Edwards' conclusion "that the facts of this case require us to accept or reject *Weinstein*" is the only correct view of this case (App. A, *infra*, p. 11a).

EJA's complaint alleges that its "Falcon was totally destroyed when it crashed and sank in the navigable waters of Lake Erie off shore from the airport . . . (R. 5). The district court admitted that "In ruling on a motion to dismiss for lack of jurisdiction over the subject matter, the allegations of the complaint must be construed most strongly in favor of the plaintiff" (App. B, *infra*, p. 28a). Furthermore, the district court assumed EJA's "position that the damage to the plane from contact with the birds, fence and truck was minimal compared to the total destruction of the aircraft when it 'crashed and sank in the navigable waters of Lake Erie'" (App. B, *infra*, p. 31a). The court of appeals also admitted that EJA's "plane fell into navigable waters" and that "the aircraft was alleged to be a total loss as a result of the soaking in the waters of Lake Erie" (App. A, *infra*, pp. 1a-2a).

Thus, there has never been any question in this case about the following two facts: (1) *EJA's plane crashed into navigable waters*, and (2) *it was totally destroyed when it crashed and sank in those navigable waters*.

The court of appeals reasoned that this case could be reconciled with *Weinstein* because the tort in this case occurred over land when EJA's Falcon hit the seagulls and its engines became crippled; while in *Weinstein* the tort occurred over navigable water when the aircraft crashed into Boston Harbor. To reach such a conclusion one must totally disregard the actual facts of the Boston Harbor crash—facts which are chillingly identical to the facts of this crash. The facts of the Boston Harbor crash are reported in *Rapp v. Eastern Air Lines, Inc.*, 264 F. Supp. 673 (E.D. Pa.

1967)—one of the approximately 150 cases brought in federal courts in Philadelphia and Boston as a result of the Boston Harbor tragedy—as follows:

On October 4, 1960, Eastern Air Lines Flight 375 crashed into the waters of Boston Harbor just outside Logan Airport in Boston, Massachusetts. The plant was on a commercial flight from Boston to Philadelphia. Fifty-nine passengers and the three crewmen were killed; 10 persons survived. The airplane was a Lockheed 188 Electra, a four-engine turbo-prop aircraft. The 501-D-13 engines had been designed and built by General Motors.

The flight took off from runway 9 which is 7,021 feet in length. The taxi out to the runway, the take-off roll, the lift-off and the climb were all normal. The aircraft climbed naturally to about 200 feet, when a burst of flame erupted very briefly and quickly from number one engine. After the burst of flame, the aircraft continued to climb for 200-300 feet, reaching a maximum of 400-500 feet, when the number one engine came to a complete stop and the propeller on number one was seen to rotate slowly. The aircraft then made a flat left turn and returned to its original heading parallel to the runway. Thereafter, the plane made another flat turn, the nose went up and it began to climb, after which it went into a steep left bank, with the right wing high. The crash followed. *A total of 47 seconds had elapsed from the take-off to the time of the disaster.*

The plane met a flight of starlings about 6/10ths of a mile from the beginning of the runway. Estimates of the amount of dead starlings found on the runway varied from 50 to 100. Five to ten dead gulls were also found in the same general area. A sufficient amount of bird material had penetrated into the air inlet of the plane as to cause the auto-feathering device to shut off number one engine or so as to cause a flameout and the crew to shut

off number one engine. At any rate, the ingestion of the birds into the air inlet caused the number one engine to shut off. (264 F. Supp. at 675; emphasis added)

The facts of the Boston Harbor crash, as reported in *Rapp*, were presented to both the district court and the court of appeals in this case by EJA. In reply, the City could only argue that these facts should be disregarded by the court of appeals because they did not appear in the *Weinstein* decision. Apparently, Judge McCree found that to be a persuasive argument for he states in his concurring opinion, "Neither in that court's opinion [*Weinstein*], nor in the opinion of the District Court whose judgment it was reviewing, 203 F. Supp. 430 (E.D. Pa. 1962), is there a finding where the impact of the tortious conduct was first evidenced—over land or over sea" (App. A, *infra*, p. 7a). Judge Edwards was not so persuaded because he found a clear and irreconcilable conflict between the facts in this case and the holding in *Weinstein*. EJA submits that this is the only correct view and the only way courts should approach the practical problems of solving questions brought before them. Judges need not restrict their vision to the four corners of one reported decision while refraining from reading another. It seems preposterous to argue, as the City did here, that courts should totally disregard the reported facts of the Boston Harbor crash when deciding this case.

The simple truth is, in *Weinstein* the Third Circuit was faced with the question of whether a case involving the crash of an aircraft into navigable territorial waters was cognizable in admiralty. The airplane had crashed shortly after takeoff because it

became "crippled" over land when birds were ingested into its jet-powered engines. It "fortuitously" crashed in navigable waters nearby. Nevertheless, the Third Circuit held that such a case was within the jurisdiction of admiralty. In view of the amazing similarity between the facts in this case and the facts of the Boston Harbor crash, there is no escape from the conclusion that the Sixth Circuit's decision here is in direct and irreconcilable conflict with the Third Circuit's decision in *Weinstein*.

One of the prime purposes of the certiorari jurisdiction of this Court is to bring about uniformity of decisions on the same matter of federal law among the federal courts of appeal, and this Court has often granted review to resolve irreconcilable conflicts between decisions of the courts of appeal. See, e.g., *Avco Corp. v. Aero Lodge No. 735 I.A.M. & A.W.*, 390 U.S. 557 (1968), and *Northeastern Pennsylvania National Bank & Trust Co. v. United States*, 387 U.S. 213 (1967). EJA submits that such a conflict exists here and that certiorari should be granted in this case to bring about uniformity in the decisions of the courts of appeal on this matter of federal law.

II. The Question of Federal Law Involved Here Is An Important One Which Has Not Been. But Should Be. Settled by This Court

In his dissenting opinion in this case Judge Edwards states:

... There are legal and policy questions of great portent for the future which this case requires us to answer. I believe that the facts of this case require us to accept or reject *Weinstein*, *supra*, and thus, to decide for this Circuit whether air ships, which are increasingly displacing water-

borne ships in maritime commerce, are within the maritime jurisdiction when they crash on navigable waters (App. A, *infra*, p. 11a).

To explain this statement Judge Edwards reviews in his opinion the historical scope of admiralty jurisdiction, the statutes which indicate that Congress has long "recognized maritime jurisdiction over aircraft flying over, resting upon, or crashing into navigable waters" (App. A, *infra*, p. 12a), this Court's cases concerning the scope of maritime jurisdiction, the admiralty cases in the Sixth Circuit, the *Weinstein* case and the facts of this case. EJA submits that Judge Edwards' dissenting opinion is a thorough, scholarly, well-reasoned and correct statement of the law in this area and adopts it without reservation in connection with this petition. For brevity, EJA will not repeat and quote extensively from Judge Edwards' dissent in this petition, but will rely instead upon this Court's careful reading of it in the Appendix hereto. A few additional matters concerning the importance of the question of federal law here involved should be noted.

Aircraft are fast replacing ships as the primary means of travel across navigable waters. The 1969 edition of the Federal Aviation Administration's Statistical Handbook of Aviation states that during calendar year 1968 approximately 140.5 million passengers enplaned on this country's certified air carrier fleet (p. 6). While all of these passengers did not travel over navigable waters, some 5.5 million of them traveled by air to Europe alone (*Id.* p. 91). Furthermore, it is a matter of common knowledge that most airports serving metropolitan areas on the coasts and the Great Lakes are located near navigable water. It is also a known fact that the majority of aircraft acci-

dents occur during landings and takeoffs. Finally, it is a matter of common knowledge to the judiciary that a high percentage of aircraft accidents result in litigation in the courts. The upshot of all this is that there have been, and will unquestionably continue to be, a large number of cases involving aircraft crashes into navigable water where the cause of the crash is alleged to be tortious conduct which occurred on land. See, e.g., *Harris v. United Air Lines, Inc.*, 275 F. Supp. 431 (S.D. Iowa 1967) and *Thomas v. United Air Lines, Inc.*, 24 N.Y. 2d 714, 249 N.E. 2d 755 (1969), cases arising out of the crash of a Boeing 727 jet which "fortuitously" crashed into the navigable waters of Lake Michigan within the territorial boundaries of the State of Illinois; *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Calif. 1954), a case involving a crash east of Wake Island; *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958), where tortious acts committed on land caused an airliner to explode and burn in mid-air off the coast of New Jersey and the aircraft went out of control and crashed into the sea; and *Hornsby v. The Fishmeal Co.*, 285 F. Supp. 990 (W.D. La. 1968), *rev'd on other grounds*, 431 F.2d 865 (5th Cir. 1970), where two light planes collided in mid-air over the Gulf of Mexico within one marine league of the Louisiana shore.

In all such cases which have arisen in the past, and in all similar cases to arise in the future, the threshold question must be—is the tort involved a maritime one? It is important to note that this question *must* be answered whether jurisdiction is based upon admiralty or not. Thus, if the tort is a maritime one the federal general maritime law is the substantive law to be applied rather than state law, whether the case is brought

in federal court on the admiralty side, in federal court on the "law side" on the basis of diversity (or against the government under the Federal Tort Claims Act), or in a state court under the "savings clause" (28 U.S.C. § 1333(1)). *Hess v. United States*, 361 U.S. 314 (1960).

Until the Sixth Circuit's decision in this case, *every* case involving the crash of an aircraft in navigable waters had been held to be within admiralty jurisdiction,⁶ even where the cause of the crash was alleged to be tortious conduct which occurred on land. Those cases coming after *Weinstein* cited and followed the Third Circuit's decision in that case.⁷ This was so despite criticism leveled at *Weinstein* by the American Law Institute in its STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).⁸ Actually, the ALI's criticism of *Weinstein* stemmed from the problem involved in "borrowing" a state's substantive law in those death cases where the aircraft crashed in navigable territorial waters and the Death on the High Seas Act⁹ (DOHSA) was inapplicable. See, e.g., *Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968). Those problems have now been laid to rest by this Court's decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which recognized a remedy for wrongful death under the general maritime law.

⁶ See, e.g., the cases cited in Judge Edwards' dissenting opinion at p. 26a (App. A, *infra*).

⁷ See, e.g., the cases cited in Judge Edwards' dissenting opinion at p. 9a, n.1 (App. A, *infra*).

⁸ See pp. 231-234 of that study.

⁹ 46 U.S.C. § 761.

It is clear that since *Moragne* the courts (except for the Sixth Circuit's decision in this case) have continued to find that cases involving aircraft crashes in navigable water are within the jurisdiction of admiralty. See, e.g., *Hornsby v. The Fishmeal Co.*, 431 F.2d 865 (5th Cir. 1970); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971) (crash of private airplane at sea); *Leroy v. United Air Lines, Inc.*, 11 Av. Cas. ¶ 17,919 (Ill. Cir. Ct. 1970) (crash of a Boeing 727 in Santa Monica Bay shortly after takeoff from Los Angeles International Airport); and *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447 (E.D.N.Y. 1971) (action against manufacturer of Navy jet bomber to recover for death of crewman who fell from the aircraft over the high seas).

Defining the scope of admiralty jurisdiction to include aircraft crashes in navigable waters is also important to the efficient judicial administration of such cases. At first blush the Sixth Circuit's holding in this case might seem attractive to those holding a restrictive view of the jurisdiction of federal courts. Thus, in this very case one might conclude that the state court in Cleveland would be the most appropriate forum to deal with this case rather than the federal court there. Such an approach completely ignores the actual realities involved in aviation accident litigation. For example, in this case the Sixth Circuit has not reduced the work load of the district court in Cleveland; it has simply multiplied litigation by causing both the district court and the state court in that city to litigate the same issues of fact. That is, the United States (respondent Dicken's employer) could be sued here only in federal court.¹⁰ Thus, if the Sixth Cir-

¹⁰ 28 U.S.C. § 1346(b).

cuit's opinion stands in this case EJA will not be able to have a joint trial against both tortfeasors in federal court, but will be forced to litigate its Tort Claims action against the government in federal court and conduct an identical law suit against the City in state court "across the street."¹¹

This phenomenon is a daily problem in aviation accident litigation because of the government's pervasive involvement in all aspects of aviation—such as air traffic control, regulation of air carriers and aircraft manufacturers, licensing of pilots, etc. A federal forum in aviation accident cases involving major accidents allows the litigants possible access to the Panel on Complex and Multidistrict Litigation (and transfer for discovery) under 28 U.S.C. § 1407; transfer for discovery and trial under 28 U.S.C. § 1404(a); and the ability to join the United States as a defendant or a third-party defendant. The application of federal general maritime law in admiralty cases insures uniformity of decisions and uniformity of results in multiparty cases, and eliminates complex choice of law problems. These everyday aspects of litigation do not escape the practitioner's notice in this field, and they undoubtedly account for the large number of aviation accident cases being litigated in federal courts. The fact is, the Sixth Circuit's opinion here will *not* relieve the workload of the federal courts; it will simply multiply litigation and increase the workload of the entire court system—state and federal.

EJA submits that the matter of federal law involved in this case is an extremely important one, not only for the petitioners here, but for many, many liti-

¹¹ There is no diversity between EJA and the City.

gants in aviation accident cases in years to come. As noted by Judge Edwards, "there is no precedent squarely in point concerning airplane crashes in navigable waters of a state . . . from the United States Supreme Court" (App. A, *infra*, p. 26a). For these reasons this Court should grant certiorari to resolve the conflict between the Sixth Circuit's decision in this case and the Third Circuit's decision in *Weinstein*.

III. The Sixth Circuit's Ruling on This Important Matter of Federal Law Is Such a Departure From All Prior Authority As To Call for the Exercise of This Court's Power of Supervision

In addition to *Weinstein, supra*, and this case, there are many, many lower court cases—both state and federal—involving aircraft crashes into navigable waters. In *every* such case that can be found the holding has always been the same: aircraft crashes in navigable waters are within the jurisdiction of admiralty. See, e.g., *Hornsby v. Fishmeal Co.*, 285 F. Supp. 990 (W.D. La. 1968), *rev'd on other grounds*, 431 F.2d 865 (5th Cir. 1970); *Rapp v. Eastern Airlines, Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967), *aff'd sub nom. Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968); *Horton v. J & J Aircraft, Inc.*, 257 F. Supp. 121 (S.D. Fla. 1966); *Montgomery v. Good-year Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1964), *aff'd*, 392 F.2d 777 (2d Cir. 1968); *Harris v. United Airlines*, 275 F. Supp. 431 (S.D. Iowa 1967); *Stiles v. National Airlines, Inc.*, 161 F. Supp. 125 (E.D. La. 1958), *aff'd*, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959); *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958); *Bergeron v. Aero Associates, Inc.*, 213 F. Supp. 936 (E.D. La. 1963); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D.

Cal. 1954); *Krause v. Sud-Aviation, Société Nationale de Constr. Aero.*, 301 F. Supp. 513 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 428 (2d Cir. 1969); *King v. Pan American World Airways*, 166 F. Supp. 136 (N.D. Cal. 1958), *aff'd*, 270 F.2d 355 (9th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960); *Fernández v. Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D.N.Y. 1957); *Higa v. Transocean Airlines*, 124 F. Supp. 13 (D.C. Hawaii 1954); *Lacey v. L. W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. Mass. 1951); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971); *Leroy v. United Air Lines, Inc.*, 11 Av. Cas. ¶ 17,919 (Ill. Cir. Ct. 1970); *Thomas v. United Air Lines, Inc.*, 24 N.Y.2d 714, 249 N.E.2d 755 (1969); *accord*, *Kropp v. Douglas Aircraft Co.*, 319 F. Supp. 447 (E.D.N.Y. 1971).

The above list is not meant to be complete. It is meant to illustrate that the Sixth Circuit's decision in this case *stands alone* against a tremendous volume of authority holding to the contrary. The *only* case which can be found that reaches a conclusion similar to the Sixth Circuit's decision here is the case of *Weinstein v. Eastern Airlines, Inc.*, 203 F. Supp. 430 (E.D. Pa. 1962), the district court case which the Third Circuit reversed in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963). The district court in *Weinstein* concluded that "... admiralty jurisdiction does not encompass tortious causes of action arising from crashes of airplanes into the navigable waters of a state. . . ." 203 F. Supp. at 431. In rejecting that narrow view of the scope of admiralty jurisdiction the Third Circuit said:

At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and

commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across these same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels.

Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging. 316 F.2d at 763.

The Third Circuit's ruling in *Weinstein* has been cited and followed many, many times since it was pronounced in 1963. Despite this volume of authority to the contrary, the Sixth Circuit in its opinion in this case did not discuss a *single* case involving the crash of an aircraft into navigable waters, with the exception of *Weinstein*. Instead, it found that this case was controlled by three opinions from this Court; two workmen's compensation cases dating back to 1928¹² and 1935,¹³ and a 1935 case involving injury to a ship's passenger.¹⁴ The Sixth Circuit used these three cases to reach its conclusion as to the locality where the tort in this case occurred.

EJA will not belabor this Court with a discussion of the merits of this kind of approach to the solution of an important question of federal law—whether the scope of admiralty jurisdiction encompasses cases involving aircraft crashes into navigable waters. Suffice it to say, as Judge Edwards points out in his dissent, “I make no suggestion that there is a simple con-

¹² *Smith & Son v. Taylor*, 276 U.S. 179 (1928).

¹³ *Minnie v. Port Huron Co.*, 295 U.S. 647 (1935).

¹⁴ *The Admiral Peoples*, 295 U.S. 649 (1935).

sistency to be found in the reasoning of all these cases [*Smith & Son, supra*; *Minnie, supra*; and *The Admiral Peoples, supra*]. Harsh facts frequently appear to have affected results" (App. A, *infra*, p. 15a).

In *Thomson v. Chesapeake Yacht Club, Inc.*, 255 F. Supp. 555 (D. Md. 1965), Chief Judge Thomsen noted a similar difficulty in trying to fit every case into a neat pattern. He said:

It is difficult, if not impossible, to reconcile the opinions in such cases as . . . *Wiper* [*Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir. 1955)] with the opinions in the . . . aircraft cases.

* * *

The aircraft cases present special problems. Although the negligence may have occurred on land, where there was negligent maintenance, the impact (effect) of the negligence on the passengers did not occur until something went wrong during the flight and the plane started to fall. Something may have started to go wrong over the land before the plane reached the sea, but that is usually impossible to prove one way or the other in aircraft cases, and the decisions adopt a practical approach. (255 F. Supp. 557, 558; emphasis added.)

EJA submits that the court of appeals here did not adopt a practical approach, and that by mechanically applying certain language from old workmen's compensation cases to reach a conclusion in a case involving the crash of an aircraft into navigable waters, the Sixth Circuit has fashioned a totally unworkable rule for future aircraft cases. The Sixth Circuit has decided that the locality of the tort in an aviation case is not where the aircraft crashes, but where the aircraft first becomes "crippled." Apart from the diffi-

culties of locating such a point, it can also be seen that the rule may apply only to the aircraft, rather than to the people inside, who may not become injured in any way until the aircraft crashes. In this very case, for example, if EJA's crew had been killed or injured their death or personal injury cases would clearly have been cognizable in admiralty. See *Moragne v. States Marine Lines, Inc.*, *supra*. Thus, the Sixth Circuit's rule here means that state law will apply to the action brought to recover damages for loss of the aircraft, and federal maritime law will apply to the death and injury claims brought by the passengers and crew or their beneficiaries. This could also result in the need for simultaneous multiple litigation in state and federal courts. The result is confusion, unnecessary complexity and unreality. In this case, for example, it makes no sense to say that EJA's claim for the *total* destruction of its aircraft occurred when the plane first struck the birds, rather than when it crashed and sank in the navigable waters of Lake Erie.

In short, the Sixth Circuit's opinion in this case is clearly erroneous, it is in direct conflict with the Third Circuit's rule in *Weinstein*, and contrary to *every* case that can be found involving aircraft crashes into navigable waters. There is no possibility that this erroneous decision will be rectified by subsequent litigation. Therefore, prompt action by this Court is required for its reversal. While it is true that this Court does not sit solely for the purpose of correcting errors made by courts of appeal, where there is a conflict among the decisions of the courts of appeal on an important matter of federal law—such as the scope of admiralty jurisdiction—and the decision in question is clearly a questionable one, this Court has granted cer-

tiorari. See, *eg*, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Williams v. Lee*, 358 U.S. 217 (1958).

EJA submits that the Sixth Circuit's ruling in this case is such a departure from all the authority holding that aircraft crashes in navigable waters are within admiralty jurisdiction as to call for the exercise of this Court's supervision, and that certiorari should therefore be granted in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 19, 1971

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20706

EXECUTIVE JET AVIATION, INC., ET AL., *Plaintiffs-Appellants*,

v.

CITY OF CLEVELAND, OHIO, ET AL., *Defendants-Appellees*.

APPEAL from the United States District Court for the
Northern District of Ohio, Eastern Division.

Decided and Filed August 24, 1971.

Before PHILLIPS, Chief Judge, and EDWARDS and MCCREE,
Circuit Judges.

PHILLIPS, Chief Judge. This appeal grows out of one-plane aircraft accident. The suit was filed in admiralty. The sole issue on appeal is whether the action is within the admiralty jurisdiction of the District Court. We hold that the alleged tort occurred on land, even though the plane fell into navigable waters shortly after take off from the airport, and that no right of action is cognizable in admiralty. We affirm the judgment of District Judge Girard E. Kalbfleisch, who dismissed the complaint.

The facts, as set forth in the complaint and supplemented by interrogatories and depositions, are as follows:

On July 28, 1968, a Falcon Mystere jet aircraft, owned by appellant Executive Jet Sales, Inc., and operated by appellant Executive Jet Aviation, Inc., struck hundreds of sea gulls seconds after take off from Burke Lakefront Airport in Cleveland, Ohio. The sea gulls were flushed from the

airport runway by the aircraft as it became airborne and collided with the plane over the airport runway. The plane immediately suffered a substantial loss of power and began to descend while still over land. It struck the airport perimeter fence, then hit a pick-up truck, and finally settled a short distance off shore into the navigable waters of Lake Erie.

No persons were killed or injured, but the aircraft was alleged to be a total loss as a result of the soaking in the waters of Lake Erie.

The appellees are the City of Cleveland, owner of the airport; Phillip A. Schwenz, the airport manager on the date in question; and Howard E. Dicken, the air traffic controller on duty at the time in question.

The complaint alleged that the loss of the aircraft was a result of the appellees' negligence in clearing the aircraft for take off, failing to warn appellants of the huge flock of sea gulls on the runway, and failing to remove the sea gulls from the runway.

The Supreme Court said in *The Admiral Peoples*, 295 U.S. 649, 651:

"This is one of the border cases involving the close distinctions which from time to time are necessary in applying the principles governing the admiralty jurisdiction. That jurisdiction in cases of tort depends upon the locality of the injury. It does not extend to injuries caused . . . to persons or property on the land. Where the cause of action arises upon the land, the state law is applicable. *The Plymouth*, 3 Wall. 20, 33; *Johnson v. Chicago & Pacific Elevator Co.*, 119 U.S. 388, 397; *Cleveland Terminal & V. R. Co. v. Cleveland Steamship Co.*, 208 U.S. 316, 319; *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 59; *State Industrial Comm'n v. Nordenholt Corp.*, 259 U.S. 263, 272; *Smith*

& Son v. Taylor, 276 U.S. 179, 181; compare *Vancouver S. S. Co. v. Rice*, 288 U.S. 445, 448.”

The dispositive issue is whether the cause of action for the alleged tort arose on land or on navigable water.

The test to determine whether a cause of action in tort arose on land or on navigable water was applied by decisions of the Supreme Court in *The Admiral Peoples*, *supra*, and *Minnie v. Port Huron Co.*, 295 U.S. 647. We consider these opinions, written by Chief Justice Hughes for a unanimous Court, to control the present case.

In *The Admiral Peoples*, *supra*, a lady passenger fell from the ship's gangplank onto the wharf where she was injured.¹ The passenger alleged that the fall was caused by negligent placement or construction of the ship's gangplank. The Supreme Court said:

“By reason of that neglect, as the libel alleges, she fell from the plank and was violently thrown forward upon the dock. Neither the short distance that she fell nor the fact that ~~she~~ fell on the dock and not in the water, alters the nature of the cause of action which arose from the breach of duty owing to her while she was still on the ship and using its facility for disembarking.

“This view is supported by the weight of authority in the federal courts. In *The Strabo*, 90 Fed. 110, 98 Fed. 998, libelant, who was working on a vessel lying at a dock, attempted to leave the vessel by means of a ladder which, by reason of the master's negligence, was not secured properly to the ship's rail and in consequence the ladder fell and the libelant was thrown to the dock and injured. The District Court, sustaining the admiralty jurisdiction, asked these pertinent ques-

¹ A wharf is an extension of land and not within the jurisdiction of admiralty. *Rodrique v. Aetna Casualty Co.*, 395 U.S. 352, 360.

tions (90 Fed. p. 113): 'If a passenger, standing at the gangway, for the purpose of alighting, were disturbed by some negligent act of the master, would the jurisdiction of this court depend upon the fact whether he fell on the dock, and remained there, or whether he was precipitated upon the dock in the first instance, or finally landed there after first falling on some part of the ship? If a seaman, by the master's neglect, should fall overboard, would this court entertain jurisdiction if the seaman fell in the water, and decline jurisdiction if he fell on the dock or other land? The inception of a clause of action is not usually defined by such a rule.' The Circuit Court of Appeals of the Second Circuit, affirming the decision of the District Court (98 Fed. p. 1000), . . . said: 'The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the string-piece of the wharf or in the water.' See, also, *The Atna*, 297 Fed. 673, 675, 676; *The Brand*, 29 F. (2d) 792." *Id.* at 652-53.

The Court held in *The Admiral Peoples* that the passenger's cause of action arose on navigable water.

The Supreme Court reached the same conclusion in *Minnie v. Port Huron Co.*, *supra*, 647-49:

"Petitioner, a longshoreman, was injured at Port Huron while unloading a vessel lying in navigable water. He was about his work on the deck of the vessel when he was struck by a swinging hoist, lifting cargo from a hatch, and was precipitated upon the wharf. He sought compensation under the compensation act of the State of Michigan. His employer, the Port Huron Terminal Company, contended that the accident occurred upon navigable water and that the state law did not apply. The defense was overruled

by the state commission in the view that the injury must have been occasioned by petitioner's fall upon the wharf and hence that the claim was within the state statute, although the injury would not have been received except for the force applied to his person while on the vessel. The Supreme Court of the State vacated the commission's award, holding that the federal law controlled. 269 Mich. 295; 257 N. W. 831. Because of an asserted conflict with decisions of this Court, a writ of certiorari was granted.

"... In the instant case, the injury was due to the blow which petitioner received from the swinging crane. It was that blow received on the vessel in navigable water which gave rise to the cause of action, and the maritime character of that cause of action is not altered by the fact that the petitioner was thrown from the vessel to the land.

"We had the converse case before us in *Smith & Son v. Taylor*, 276 U.S. 179. There a longshoreman, employed in the unloading of a vessel at a dock, was standing upon a stage that rested solely upon the wharf and projected a few feet over the water to or near the vessel. He was struck by a sling loaded with cargo, which was being lowered over the vessel's side and was knocked into the water, where sometime later he was found dead. It was urged that the suit was solely for the death which occurred in the water and hence that the case was exclusively within the admiralty jurisdiction. We held the argument to be untenable. We said: 'The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death. *The G. R. Booth*, 171 U.S. 450, 460. The substance and consummation of the occurrence which gave rise to the cause of action took place on land.' *Id.*, p. 182."

In the present case the aircraft was precipitated into Lake Erie by the allegedly negligent acts of the appellees on land. The aircraft collided with the sea gulls and began to fall while over land. The fence and the truck were struck on land. Under the authorities cited above it is of no consequence that the major amount of damage occurred after the aircraft sank in navigable water. The alleged negligence of appellees "was given and took effect" on land. *Smith & Son v. Taylor*, 276 U.S. 179, 182. The cause of action arose on land and not on navigable water.

Appellants rely heavily on *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3rd Cir.). As we read that decision, the test for admiralty jurisdiction over torts stated at 316 F.2d at 761 produces the same result we have reached when applied to the facts of the present case. The Court said:

"The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; i. e., the place where it happened." *Id.* at 761.

Since we agree with the District Court that the alleged tort in this case occurred on land before the aircraft reached Lake Erie, and since admiralty jurisdiction does not extend to torts committed on land, it is not necessary to consider the question of maritime relationship or nexus discussed by this court in *Gowdy v. U. S.*, 412 F.2d 525, 527-29 (6th Cir.), *cert. denied*, 396 U.S. 960, and *Chapman v. City of Gross Pointe Farms*, 385 F.2d 962, 966 (6th Cir.). See *Nacirema v. Johnson*, 396 U.S. 212, 215, n. 7; *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 58-60; *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727, 729-31 (6th Cir.).

Affirmed.

McCREE, Circuit Judge (concurring in the opinion of Judge Phillips). I wish to add a few words of concurrence to Chief Judge Phillips' opinion. Our court adopted the "locality-plus" test of maritime jurisdiction in *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967), and *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir. 1965), *cert. denied*, 382 U.S. 812 (1965), but I agree with Judge Phillips that the difference between that test and the "locality-alone" test is not involved in the decision of this case. The crucial question here—on which I read Judge Phillips and Judge Edwards to take opposite views—is where did the tort occur?

That question I believe is foreclosed by the cases cited by Judge Phillips, at 4-5 (draft opinion), and Judge Edwards, at 9-10 (draft opinion), and by *Wiper*. The rule, as I understand it, is that the situs of the tort is where the negligence becomes operative, not where the damages, or the major portion of them, are sustained. Applied here, this rule requires affirmance of Judge Kalbfleisch's careful opinion. The plane hit the gulls over land; and there, under our rule, is where the tort occurred. Maritime jurisdiction is absent, and it becomes unnecessary to decide whether there is (or must be) a "plus", because there is no maritime "locality".

I do not read the Third Circuit's opinion in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963), as necessarily contradicting this view. Neither in that court's opinion, nor in the opinion of the District Court whose judgment it was reviewing, 203 F.Supp. 430 (E.D. Pa. 1962), is there a finding where the impact of the tortious conduct was first evidenced—over land or over sea. However, it is clear that the plane was airborne, and, at the posture of review required by the motion to dismiss, the

inference most favorable to plaintiff would be that the negligence became operative over water. Nevertheless, that court held that the situs of the tort was where the injury was sustained, 316 F.2d at 765, and on the facts presented, it was clear that that was within navigable waters. We have a different rule, and I believe we could not reach that result without overruling *Wiper*, not to mention the Supreme Court cases cited by Judge Phillips.

In *Weinstein*, the Third Circuit stated in dictum that airplanes, at least over navigable waters, were to be considered prima facie maritime. 316 F.2d at 7. I agree, as a matter of policy, with much of what Judge Edwards has written in support of the view that "air ships . . . are within the maritime jurisdiction when they crash on navigable waters." At 5 (draft opinion). But I have not seen cited a statute indicating that Congress has so extended maritime jurisdiction. Arguably it might be able to do so, and should, but it is the job of Congress, and not of the courts, to broaden maritime jurisdiction to cover the facts of this case. Under established law, we are faced only with a narrower question, which can be answered fairly readily unless we wish to depart from the precedents which normally bind us.

EDWARDS, Circuit Judge, dissenting. This case presents a single important question:

Do the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash is alleged to be tortious conduct which occurred on land?

The Third Circuit has previously answered this question affirmatively in the context of death cases arising out of the crash of a passenger aircraft into Boston Harbor shortly after takeoff where the causes of the crash were alleged, as here, to have been land-based. *Weinstein v.*

Eastern Airlines, Inc., 316 F.2d 758 (3d Cir.), cert. denied, 375 U.S. 940 (1963).¹

In our instant case, the facts properly before the court on motion for summary judgment showed that an aircraft taking off from a lakefront airport in Cleveland, Ohio, struck a flight of sea gulls, ingesting sufficient of them into its jet system to cause loss of power while it was still over the runway and that the plane subsequently grazed a truck and the airport perimeter fence before being destroyed by crashing into and sinking in the navigable waters of Lake Erie two-fifths of a mile from shore. Appellants allege that the crash was caused by failure of defendants to warn the pilot of the aircraft of the presence of "a sea of birds" on the runway, which fact was known to defendants or their agents but not to the pilot because of the topography of the runway.

The crew of the aircraft survived and the pilots by deposition provided the District Court with this vivid and undisputed summary of the crash.

"After clearance to take-off was received the pilot in the left seat executed the take-off and rotated at approximately 125 Kts. The pilot in the right seat made a power check, voiced 30 Kts., 100 Kts., V, and rotate. The pilot in the left seat could not distinguish the bird line prior to rotation and in his estimation could not abort the take-off. On rotating a sea of

¹ *Weinstein* has subsequently been reaffirmed by the Third Circuit in *Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir.), cert. denied, 393 U.S. 979 (1968), and has been cited and followed by a number of District Courts: *Hornsby v. Fishmeal Co.*, 285 F.Supp. 990, 993 (W.D. La. 1968), rev'd on other grounds, 431 F.2d 865 (5th Cir. 1970); *Rapp v. Eastern Airlines, Inc.*, 264 F.Supp. 673 (E.D.Pa. 1967) (aff'd by *Scott*, supra); *Horton v. J & J Aircraft, Inc.*, 257 F.Supp. 120 (S.D.Fla. 1966); *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F.Supp. 447, 453 (S.D.N.Y. 1964), aff'd, 392 F.2d 777 (2d Cir. 1968); *Harris v. United Airlines*, 275 F.Supp. 431 (S.D.Iowa 1967).

birds on the runway became visible. Approaching the birds at approximately 75 feet caused them to flush and fly into the aircraft * * *. Bird impact substantially reduced the air speed an estimated 15 or 20 Kts. The pilot in the left seat raised the gear handle, the pilot in the right seat maneuvered the throttles in an effort to obtain partial power. There was almost immediate total loss of power. The engine temperature indicated above 850 degrees on both engines and the RPM dropped rapidly below 70%. The aircraft flew in a semi-stalled attitude stall horn blowing until contacting the water. The aircraft struck the top of a pick-up truck and a portion of the airport perimeter fence. The aircraft contacted the water in a flat attitude and on a second impact water entered the cabin almost immediately. Only a few seconds passed between bird impact and water contact and it is estimated that the aircraft did not attain more than 75 to 100 feet in altitude."

In a well-reasoned opinion which sought earnestly to follow the logic of this court's previous opinions dealing with maritime jurisdiction (in cases where the facts differed greatly from the present ones), the District Judge granted defendant-appellees' motions for summary judgment. Relying primarily upon this Court's opinions in *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967), and *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir.), cert. denied, 382 U.S. 812 (1965), the District Judge reasoned:

"[I]n this case the airport and the runway were upon land and the alleged negligence which caused the plane to crash occurred upon land. Further, the plane became disabled over land and came into contact with a fence and a truck before ever crossing the shoreline. It is this Court's opinion that the eventual crash of the plane into Lake Erie, and its destruction

by water, are at best fortuitous and are significant 'not to determine the maritime or non-maritime nature of this action but only as it relates to damages.' (*Wiper*, supra.)

"It is the opinion of the Court, therefore, that the tort in this case did not occur upon navigable waters and the action is not cognizable in admiralty. In reaching this conclusion, the Court is well aware of the many decisions holding that a plane crash into navigable waters is within admiralty jurisdiction. However, as the analysis above reveals, drawing from those cases a general rule that all plane crashes into navigable waters are cognizable in admiralty and applying such a rule here would belie the principles which governed locality of the tort before the problems peculiar to air commerce arose. Where the facts are not known, a court might rightly assume that the alleged negligence became operative and effective upon the aircraft over navigable waters; but here the alleged negligence had crippled the plane well before it reached the water. Assuming otherwise would require that the Court ignore the very facts upon which it must rely in testing jurisdiction. Without distinguishing each of the cases involving an airplane crash into navigable waters, it is sufficient to state that the undisputed facts in this case demonstrate that the tort occurred over the land."

While I respect the logic and industry with which the District Judge approached his task, I would reach a different result. There are legal and policy questions of great portent for the future which this case requires us to answer. I believe that the facts of this case require us to accept or reject *Weinstein*, supra, and thus, to decide for this Circuit whether air ships, which are increasingly displacing water-borne ships in maritime commerce, are within the maritime jurisdiction when they crash on navigable waters.

ADMIRALTY JURISDICTION IN THE UNITED STATES

Article III, § 2 of the Constitution of the United States provides:

“The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . .”

By statute Congress has vested “original jurisdiction of . . . [a]ny civil case of admiralty or maritime jurisdiction . . .” in the district courts. 28 U.S.C. § 1333 (1964).

The United States Supreme Court decided over a hundred years ago that admiralty jurisdiction extended to all navigable waters (as opposed to the original tidewater or high seas concepts). This, of course, included the Great Lakes into one of which (Lake Erie) the plaintiffs’ plane crashed. *The Propeller, Genesee Chief, et al.*, 53 U.S. (12 How.) 443 (1851).

CONGRESSIONAL RECOGNITION OF ADMIRALTY JURISDICTION OVER AIRCRAFT

In various ways Congress has recognized maritime jurisdiction over aircraft flying over, resting upon, or crashing into navigable waters.

(a) In 1953 Congress adopted a statute which employed maritime jurisdiction to make a variety of federal criminal laws applicable to aircraft (owned by the United States or by United States citizens) “while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state.” 18 U.S.C. § 7(5).

(b) In 1920 Congress adopted the Death on the High Seas Act providing a remedy in the District Court in admiralty to the personal representatives of persons wrongfully killed on the high seas beyond a marine league from shore.

This statute has been unanimously interpreted as applicable to deaths resulting from airplane crashes as well as to deaths on ships on the high seas. *Wilson v. Transocean Airlines*, 121 F.Supp. 85 (N.D.Cal. 1954); *Guess v. Read*, 290 F.2d 622 (5th Cir. 1961), *cert. denied*, 368 U.S. 957 (1962) (Black, J., dissenting); *Noel v. Airponents, Inc.*, 169 F.Supp. 348 (D.N.J. 1958); *Stiles v. National Airlines, Inc.*, 161 F.Supp. 125 (E.D. La. 1958), *aff'd*, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959); *Noel v. United Aircraft Corp.*, 219 F.Supp. 556 (D.Del. 1963), *aff'd in part, rev'd in part*, 342 F.2d 232 (3d Cir. 1965); *Bergeron v. Aero Associates, Inc.*, 213 F.Supp. 936 (E.D.La. 1963); *Wyman v. Pan American Airways, Inc.*, 45 N.Y.S.2d 420 (1943), *aff'd*, 48 N.Y.S.2d 458 (S.Ct.App.Div.), *leave denied*, 49 N.Y.S.2d 271, *cert. denied*, 324 U.S. 882 (1944); *Lacey v. L. W. Wiggins Airways, Inc.*, 95 F.Supp. 916 (D.Mass. 1951).²

The emphasis of Congress upon the navigable waters test of its jurisdiction is clearly shown in the Admiralty Extension Act of 1948.

"Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

46 U.S.C. § 740 (1964).

² See also *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), overruling *The Harrisburg*, 119 U.S. 199 (1886), recognizing a remedy for wrongful death under general maritime law, and allowing application of the Death on the High Seas Act to similar death cases in territorial waters.

SUPREME COURT CASES ON MARITIME JURISDICTION

It is clear that the judicial power of the United States has the task of defining the limits of admiralty jurisdiction within the general language and history of the constitutional grant. *The Propeller, Genesee Chief, et al., supra*; *The Steamer St. Lawrence*, 66 U.S. 522 (1861); *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934). But it is equally clear that defining those limits has been and is anything but simple.

In property law, the line where the sea at high tide meets the shore is called "the meander line". The term might well be used to apply to the perimeter of admiralty jurisdiction—at least as applied to tort actions wherein the tort, as here, involves incidents on both land and navigable waters. See generally, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *London Guaranty & Accident Co. Ltd. v. Industrial Accident Comm'n*, 279 U.S. 109 (1929); *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914); *Minnie v. Port Huron Co.*, 295 U.S. 647 (1935), and *T. Smith & Sons, Inc. v. Taylor*, 276 U.S. 179 (1928). The Supreme Court has not as yet decided any case dealing with admiralty jurisdiction over airplane crashes. But in the series of sea-land cases² cited above it has decided cases where, for varying reasons, varying jurisdictional results were reached.

In *The Plymouth, supra*, the Supreme Court held that sea-based negligence of a docked steamer's crew which set fire to and burned down dock-side warehouses did not give rise to admiralty jurisdiction. The case can be and has been argued by appellants for the proposition that "locality alone" controls (referring to locality of the damage) and by appellees that it is the locality where the negligence takes effect that counts.

In *The Admiral Peoples*, 295 U.S. 649 (1935), a ship's passenger fell from a ship's gangplank (alleged to have

² We here employ "sea" in the sense of navigable waters.

been negligently placed or constructed) to a dock where she was injured. The Court noted that the breach of duty occurred on shipboard and upheld admiralty jurisdiction.

In *Minnie v. Port Huron Co.*, *supra*, a similar result was reached where a longshoreman on the deck of a vessel was struck by a swinging hoist and knocked onto a dock. The Court there noted that "the injury was due to the blow." *Id.* at 182. It cited and relied upon *T. Smith & Sons, Inc. v. Taylor*, *supra*, which reached an opposite result where the sling was land-based and knocked the longshoreman into the water. The Court's final rationale concerning *T. Smith & Sons, Inc. v. Taylor* was, "The substance and consummation of the occurrence which gave rise to the cause of action took place on land." 276 U.S. at 182.

I make no suggestion that there is a simple consistency to be found in the reasoning of all these cases.

Harsh facts frequently appear to have affected results. The *Smith & Sons* case, for example, preceded the effective date of the federal Longshoremen's Compensation Act and upheld a state compensation award. The holding of the court was to deny that "the case is *exclusively* within admiralty jurisdiction" as appellants therein were claiming. *T. Smith & Sons, Inc. v. Taylor*, 276 U.S. 179, 182 (1928) (emphasis added). And as we have noted above, Congress, in passing the Admiralty Extension Act of 1948, acted to extend admiralty jurisdiction so as to eliminate the holding of *The Plymouth*, *supra*.

Among the older cases, we find the most careful approach and reasoning in the *Imbrovek* case where Chief Justice Hughes said:

"The principal question is whether the District Court had jurisdiction; that is, whether the cause was one 'of admiralty and maritime jurisdiction.' Const. Art. III, § 2; Rev. Stat., § 563; Judicial Code, § 24; Act of Sept. 24, 1789, c. XX, § 9, 1 Stat. 73, 76. As the

injury occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met. The petitioner insists, however, that locality is not the sole test, and that it must appear that the tort was otherwise of a maritime nature. And this was the view taken by the Circuit Court of Appeals for the Ninth Circuit, in affirming a decree dismissing a libel for want of jurisdiction in a similar case. *Campbell v. Hackfeld & Co.*, 125 Fed. Rep. 696.

“At an early period the court of admiralty in England exercised jurisdiction ‘over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas.’ *De Lovio v. Boit*, 2 Gall. 398, 406, 464, 474. While its authority was denied when the injurious action took place *infra corpus comitatus*, it was not disputed that jurisdiction existed when the wrong was done ‘upon the sea, or any part thereof which is not within any county.’ (4 Inst. 134.) The jurisdiction in admiralty of the courts of the United States is not controlled by the restrictive statutes and judicial prohibitions of England (*Waring v. Clarke*, 5 How. 441, 457, 458; *Insurance Company v. Dunham*, 11 Wall. 1, 24; *The Lottawanna*, 21 Wall. 558, 576); and the limitation with respect to torts committed within the body of any county is not applicable here. *Waring v. Clarke*, *supra*; *The Magnolia*, 20 How. 296. ‘In regard to torts’—said Mr. Justice Story in *Thomas v. Lane*, 2 Sumn. 1, 9—‘I have always understood, that the jurisdiction of the Admiralty is exclusively dependent upon the locality of the act. The Admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide.’ This rule—that locality furnishes the test—has been fre-

quently reiterated, with the substitution (under the doctrine of *The Genesee Chief*, 12 How. 443), of navigable waters for tide waters. Thus, in the case of *The Philadelphia, Wilmington & Baltimore R. R. Co. v. The Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209, 215, the court said: 'The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality.' Again, in the case of *The Plymouth*, 3 Wall. 20, where jurisdiction was denied upon the ground that the substance and consummation of the wrong took place on land and not on navigable water, the court said, p. 35: 'The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.—A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. . . . The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.' See *Manro v. Almeida*, 10 Wheat. 473; *Waring v. Clarke*, *supra*, p. 459; *The Lexington*, 6 How. 344, 394; *The Commerce*, 1 Black, 574, 579; *The Rock Island Bridge*, 6 Wall. 213, 215; *The Belfast*, 7 Wall. 624, 637; *Ex parte Easton*, 95 U. S. 68, 72; *Leathers v. Blessing*, 105 U. S. 626, 630; *Panama Railroad v. Napier Shipping Co.*, 166 U. S. 280, 285; *The Blackheath*, 195 U. S. 361, 365, 367; *Cleveland Terminal & Valley R. R. Co. v. Cleveland Steamship*

Co., 208 U. S. 316, 319; *Martin v. West*, 222 U. S. 191; *The Neil Cochran*, Fed. Cas. No. 10,087; *The Ottawa*, Fed. Cas. No. 10,616; *Holmes v. O. & C. Rwy. Co.*, 5 Fed. Rep. 75, 77; *The Arkansas*, 17 Fed. Rep. 383, 384; *The F. & P. M. No. 2*, 33 Fed. Rep. 511, 513; *The H. S. Pickands*, 42 Fed. Rep. 239, 240; *Hermann v. Port Blakely Mill Co.*, 69 Fed. Rep. 646, 647; *The Strabo*, 90 Fed. Rep. 110; 2 Story on the Constitution, § 1666. It is also apparent that Congress in providing for the punishment of crimes committed upon navigable waters has regarded the locality of the offense as the basis for the exercise of its authority. Act of April 30, 1790, c. IX, § 8, 1 Stat. 112, 113; act of March 3, 1825, c. LXV, 4 Stat. 115; Rev. Stat. §§ 5339, 5345, 5346; Criminal Code, § 272, 35 Stat. 1088, 1142; *United States v. Bevans*, 3 Wheat. 336, 387; *United States v. Wiltberger*, 5 Wheat. 76; *United States v. Rodgers*, 150 U. S. 249, 260, 261, 285; *Wynne v. United States*, 217 U. S. 234, 240.

“But the petitioners urge that the general statements which we have cited, with respect to the exclusiveness of the test of locality in cases of tort, are not controlling; and that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort apart from the mere place of its occurrence has been of a maritime character. It is asked whether admiralty would entertain a suit for libel or slander circulated on board a ship by one passenger against another. See Benedict, Admiralty, 4th ed., § 231. The appropriate basis, it is said, of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event; it is suggested that the wider authority exercised in very early times in England may be due to its antedating the recognition by the common-law courts of transitory causes of action and thus arose by virtue of necessity.

"We do not find it necessary to enter upon this broad inquiry. As this court has observed, the precise scope of admiralty jurisdiction is not a matter of 'obvious principle or of very accurate history,' *The Blackheath*, *supra*. And we are not now concerned with the extreme cases which are hypothetically presented. *Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction.* The petitioner contends that a maritime tort is one arising out of an injury to a ship caused by the negligence of a ship or a person or out of an injury to a person by the negligence of a ship; that there must either be an injury to a ship or an injury by the negligence of the ship, including therein the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow.

"The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depends in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' See *The George T. Kemp*, 2 Lowell, 477, 482; *The Circassian*, 1 Ben. 209; *The Windermere*, 2 Fed. Rep. 722; *The Canada*, 7 Fed. Rep. 119; *The*

The Hattie M. Bain, 20 Fed. Rep. 389; *The Gilbert Knapp*, 37 Fed. Rep. 209; *The Main*, 51 Fed. Rep. 954; *Norwegian Steamship Co. v. Washington*, 57 Fed. Rep. 224; *The Seguranca*, 58 Fed. Rep. 908; *The Allerton*, 93 Fed. Rep. 219; Hughes, Adm. 113; Benedict, Adm., 4th ed., § 207. The libelant was injured because the care required by the law was not taken to protect him while he was doing this work. We take it to be clear that the District Court sitting in admiralty was entitled to declare the applicable law in such a case, as it was within the power of Congress to modify that law. *Waring v. Clarke*, *supra*; *The Lottawanna*, *supra*. The fact that the ship was not found to be liable for the neglect is not controlling. *If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient.*" *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 58-62 (1914). (Emphasis added.)

The more modern and more liberal interpretation of the scope of admiralty jurisdiction is perhaps best illustrated in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 117 (1962), where the Court said:

"Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." (Emphasis added and footnote omitted.)

In the most recent decision concerning admiralty jurisdiction, the Court continued its expansion of the effective boundaries of admiralty. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). In foreshadowing probable ap-

plication of the Death on the High Seas Act to deaths on territorial waters, the Court said:

"However, it is sufficient at this point to conclude, as Mr. Justice Holmes did 45 years ago, that the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases." *Id.* at 393.

SIXTH CIRCUIT ADMIRALTY CASES

In *Smith v. Lampe*, 64 F.2d 201 (6th Cir.), *cert. denied*, 289 U.S. 751 (1933), Judge Simons stated the traditional test of maritime jurisdiction for this Circuit, saying, "Where the negligent act originates on land and the damage occurs on water, the cause of action is within the admiralty jurisdiction." *Id.* at 202.

Essentially, this view was reiterated in *Interlake Steamship Company v. Nielsen*, 338 F.2d 879 (6th Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), in upholding admiralty jurisdiction over a harbor worker's federal compensation case wherein a ship's custodian was killed when in the course of his employment he drove a car off the end of the dock where his ship was berthed.

The District Judge in dismissing the instant complaint for lack of jurisdiction relied strongly upon language found in more recent opinions of this court in *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967), and *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir.), *cert. denied*, 382 U.S. 812 (1965). The District Judge read these cases as accepting the proposition that the locus of the tortious conduct, rather than the locus of the damage, was the determining factor in relation to ad-

miralty jurisdiction. While there is dictum in *Wiper* (a drowning case alleging faulty maintenance of a pier) which lends some support to this conclusion, we believe that *Chapman* adopted (and arguably extended) the rationale of the *Imbrovek* case which is quoted above. The holding in *Chapman* was:

"While the locality alone test should properly be used to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land rather than on some navigable body of water, it is here determined that jurisdiction may not be based solely on the locality criterion. A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters." *Chapman v. City of Grosse Point Farms*, *supra* at 966.

In *Gowdy v. United States*, 412 F.2d 525 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969), two judges reiterated the *Chapman* rule in the context of a tort case where a workman fell from the flat roof of a lighthouse building to the ground. The lighthouse was at the end of a land-connected breakwater, and the opinion of the court found no maritime character to the tort claim which alleged negligent maintenance of the roof.

The holding of *Chapman* has been praised in The American Law Institute, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, § 232 (1969), which presents the point of view of critics of the "locality alone" test. It is interesting to note, however, that even the *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* with its emphasis upon the state of the most significant relationship to the occurrence and the parties gives a distinct preference to "the local law of the state where the injury occurred" in tort actions involving both personal injury and property damage. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 146 and 147 (1971).

I think, however, that the proper application of *Chapman* to the facts of our instant case is best shown by the language it employed to distinguish aircraft crash cases—more particularly, the *Weinstein* case:

“It might be said that some relationship between the alleged wrong and maritime service, navigation or commerce on navigable waters, is a condition *sub silentio* to admiralty jurisdiction. Indeed, in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3rd Cir. 1963), a wrongful death case arising from a plane crash into Boston Harbor, the court was able to reconcile *McGuire, supra*, with its conclusion that locality of the injury was the exclusive determinant of admiralty jurisdiction (p. 763, n. 13):

“ ‘The result reached in *McGuire v. City of New York*, 192 F. Supp. 866 (S.D. N.Y. 1961) may well be compatible with the ‘locality alone’ test. To say that a person bathing in the shallow, and probably un-navigable in fact, waters of a public beach is within the locus of admiralty jurisdiction would be to distort the meaning of the locality test beyond what reason and policy would suggest or require.’

“In making this concession, it appears that *Weinstein* does in fact accept the ‘locality plus’ test, notwithstanding the declaration as to the propriety of the ‘locality alone’ criterion. In addition, the court also noted that aircraft had become ‘a major instrument of travel and commerce over and across’ navigable waters, and that the dangers of plane crashes into navigable waters ‘are much the same as those arising out of the sinking of a ship or a collision between two vessels.’ *Id.* at 763.” *Chapman v. City of Grosse Pointe Farms, supra* at 966.

HOLDING

I regret that I cannot agree with the majority holding in this case. There is nothing more maritime than the sea. *Pure Oil Co. v. Snipes*, 293 F.2d 60, 65 at n.6 (5th Cir. 1961).

I believe that there are many comparisons between the problems of aircraft over navigable waters and those of the ships which the aircraft are rapidly replacing. We should take judicial notice that thousands of flights of aircraft take off daily (many from waterfront airports like Cleveland's Burke Lakefront) with flights planned over the oceans or over the Great Lakes.

I have previously noted that Congress appears to have thought that admiralty jurisdiction attached solely by flight over the high seas. We have, however, no need to go that far in our instant case. We deal here with a disabled plane which crashed upon and sank into the navigable waters of the Great Lakes. Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings upon land. Arguably, they might be greater or less, but they are not the same. In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers. I do not, by referring generally to these matters as being within judicial notice, mean to pass judgment on jurisdictional problems beyond the specific requirements of this case. What I would hold is that tort cases arising out of aircraft crashes into navigable waters are cognizable in admiralty jurisdiction even if the negligent conduct is alleged to have happened wholly on land. By so doing, we would follow the reasoning and result of the *Imbrovek* case and apply it to the facts of this case:

"If more is required than the locality of the wrong in order to give the court jurisdiction the relation of the wrong to maritime service, to navigation and to com-

merce on navigable waters, was quite sufficient." *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 62 (1914).

Here the aircraft took off from a shorefront airport; its flight path led over navigable waters (if only for a brief distance); when disabled, it fell into navigable waters; and the damage complained of is damage occasioned by crashing into and sinking into navigable waters.⁴

We cannot by any means be sure that the Supreme Court will not adhere or revert to the "locality alone" test, but in the meantime we should note that there is some maritime character to any flight of any airplane over any navigable water.

If, as a result of shore-based negligence in dry dock, a sea valve were left open on a deep-water vessel, would anyone doubt admiralty jurisdiction over cases arising from its subsequent sinking?

I think we should adopt the Third Circuit rule of *Weinstein, supra*.

"We hold, therefore, that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty." 316 F.2d at 766.

This would not require endorsing its "locality alone" test, but, as is obvious from what has been said, I would accept fully much of Judge Biggs' reasoning, including the following:

"Assuming *arguendo* that some-kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdiction, we believe none-

⁴I attach no significance to the fact that the descending plane struck the top of a truck and the perimeter fence of the airport before crashing into Lake Erie. This record makes clear that the impact on the water and the sinking of the plane with its consequent water damage accomplished the destruction complained of.

theless that the cases at bar are within the admiralty jurisdiction insofar as the tort claims alleged therein are concerned. At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across these same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels." *Id.* at 763.

Aside from *Weinstein*, *supra*, and *Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968), where the Third Circuit reaffirmed *Weinstein*, there is no precedent squarely in point concerning airplane crashes in navigable waters of a state either from the Circuit Courts of Appeal or the United States Supreme Court. But there are many District Court cases, both before and after *Weinstein*, which have reached the same result. *Hornsby v. Fishmeal Co.*, 285 F. Supp. 990, 993 (W.D.La. 1968), *rev'd on other grounds*, 431 F.2d 865 (5th Cir. 1970); *Rapp v. Eastern Airlines, Inc.*, 264 F. Supp. 673 (E.D.Pa. 1967), *aff'd sub. nom. Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968); *Horton v. J & J Aircraft, Inc.*, 257 F. Supp. 121 (S.D.Fla. 1966); *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F.Supp. 447, 453 (S.D.N.Y. 1964), *aff'd*, 392 F.2d 777 (2d Cir. 1968); *Harris v. United Airlines*, 275 F. Supp. 431 (S.D.Iowa 1967). See also *Stiles v. National Airlines, Inc.*, 161 F. Supp. 125 (E.D.La. 1958), *aff'd* 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959); *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958); *Bergeron v. Aero Associates, Inc.*, 213 F. Supp. 936 (E.D.La. 1963); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D.Cal. 1954).

For the reasons outlined, I would reverse and remand the judgment of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C69-464

EXECUTIVE JET AVIATION, INC. and EXECUTIVE JET SALES,
INC., *Plaintiffs*

v.

CITY OF CLEVELAND, OHIO, East 6th and Lakeside Avenue,
Cleveland, Ohio

PHILLIP A. SCHWENZ, 724 Sandlewood,
Elyria, Ohio

and

HOWARD E. DICKEN, 23225 Cedar Point Road,
Cleveland, Ohio, *Defendants*

Memorandum and Order
Re: Motions To Dismiss

[Filed June 12, 1970]

KALBFLEISCH, J.

The instant case arises from the crash of a Falcon Mystere jet aircraft into the waters of Lake Erie near Burke Lakefront Airport at Cleveland, Ohio, on July 28, 1968. At the time of the accident there were three persons aboard the Falcon aircraft, all crew members, none of whom were injured.

The plaintiffs in the case are Executive Jet Sales, Inc., and Executive Jet Aviation, Inc., the former is alleged to be the owner of the Falcon, while the latter operated the aircraft. The complaint invokes the admiralty jurisdiction of the Court and seeks damages for total loss of the Falcon. Though the aircraft was never replaced, the prayer also

includes an amount for loss of revenue from operation of the Falcon during the reasonable period of time required for replacement.

At the time of the accident, defendant City of Cleveland owned the airport and employed Phillip A. Schwenz to manage it. Defendant Howard E. Dicken was the air traffic controller on duty at the time of the accident.

The defendants have moved to dismiss the action on the ground that the undisputed facts presently before the Court demonstrate that the claim asserted by the plaintiffs is not cognizable in admiralty and therefore the Court is without jurisdiction over the subject matter. Plaintiffs argue, on the other hand, that the complaint states a case in admiralty and that the allegations thereof are not so cast into doubt by the other material before the Court as to warrant dismissal for lack of jurisdiction.

In ruling on a motion to dismiss for lack of jurisdiction over the subject matter, the allegations of the complaint must be construed most strongly in favor of the plaintiff. *Dautartas v. Trans World Airlines*, Civil No. C65-617, N.D. Ohio (1966).

Relevant to the issues here, the complaint alleges:

"6. On July 28, 1968, plaintiffs' Falcon aircraft taxied on and took off from the airport, all under the direct supervision and control of one or more of the defendants. On said date defendant Howard E. Dicken cleared the Falcon for take off from the airport.

"7. On or about July 28, 1968, defendant Howard E. Dicken negligently and carelessly supervised and controlled, or failed to supervise and control, plaintiffs' Falcon; and negligently and carelessly failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which defendant Howard E. Dicken knew or should have known, including a huge flock of seagulls which were sitting on the active

runway of the airport at the time defendant Howard E. Dicken cleared plaintiffs' Falcon for takeoff from said runway.

"8. On and before July 28, 1968, the city and defendant Phillip A. Schwenz, and each of them, negligently and carelessly operated, controlled, maintained, supervised and inspected the airport; negligently and carelessly failed to remove and eliminate hazards to aircraft existing on, over and adjacent to the airport, including the aforementioned flock of seagulls; and negligently failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which the city and defendant Phillip A. Schwenz knew or should have known, including the aforementioned flock of seagulls.

"9. As a result of the aforesaid negligence and carelessness of defendants, and each of them, plaintiffs' Falcon struck several hundred seagulls shortly after take off from the airport when the flock flushed; and the Falcon was totally destroyed when it crashed and sank in the navigable waters of Lake Erie off shore from the airport, all to plaintiffs' damage in the sum of One million, five hundred fifty thousand dollars (\$1,550,000.00).

"10. As a further result of this negligence and carelessness plaintiffs were deprived of the use of the Falcon for the period reasonably required to obtain a replacement aircraft, the reasonable rental value for this period being Two hundred thousand dollars (\$200,000.00).

"11. As a further result of this negligence and carelessness, plaintiffs incurred salvage, raising and other costs in the sum of Thirteen thousand, six hundred forty-three dollars and 64 cents (\$13,643.64)."

In addition to the allegations set out above, there are certain undisputed facts which appear in the documents

presently before the Court. There is no question that the aircraft struck the gulls while passing over a portion of the runway upon which it had taken off. Further, there was a substantial loss of power from the plane's engines either immediately when, or at some time shortly after the Falcon encountered the birds; in either case, the loss of power occurred while the plane was still above the land.

Also, the aircraft struck the perimeter fence of Burke Lakefront Airport and also came into contact with the top of a pick-up truck which was parked outside of the airport grounds.

In answer to an interrogatory posed by defendant City of Cleveland, the plaintiffs have submitted the joint statement of W. P. Flower and Charles E. Dirk, who were piloting the Falcon at the time of the crash. Neither plaintiffs nor the defendants take issue with the factual details narrated in the statement, which reads, in part, as follows:

"After clearance to take-off was received the pilot in the left seat executed the take-off and rotated at approximately 125 Kts. The pilot in the right seat made a power check, voiced 30 Kts., 100 Kts., V₁ and rotate. The pilot in the left seat could not distinguish the bird line prior to rotation and in his estimation could not abort the take-off. On rotating a sea of birds on the runway became visible. Approaching the birds at approximately 75 feet caused them to flush and fly into the aircraft * * *. Bird impact substantially reduced the air speed an estimated 15 or 20 Kts. The pilot in the left seat raised the gear handle, the pilot in the right seat maneuvered the throttles in an effort to obtain partial power. There was almost immediate total loss of power. The engine temperature indicated above 850 degrees on both engines and the RPM dropped rapidly below 70%. The aircraft flew in a semi-stalled attitude stall horn blowing until contacting the water. The aircraft struck the top of a pick-up truck and a portion of the airport perimeter fence.

The aircraft contacted the water in a flat attitude and on a second impact water entered the cabin almost immediately. Only a few seconds passed between bird impact and water contact and it is estimated that the aircraft did not attain more than 75 to 100 feet in altitude."

There is no genuine issue as to any of the facts set out above. The disagreement among the parties, as evidenced by the briefs supporting and opposing the motions, is not over the hard facts of the case, but rather over how the facts are to be characterized, what the present state of the law is on the issue, and how the law is to be applied to resolve the jurisdictional issue.

There is no question that the plane encountered the perimeter fence of the airport, the top of a pick-up truck and the navigable waters of Lake Erie. In the view which this Court takes of the law, it matters not whether the plane "crashed" into the fence and truck and "eventually came to rest" in Lake Erie, or whether it "grazed" the fence and truck and "crashed" into Lake Erie. For the purpose of the motions, however, the Court assumes the plaintiffs' position that the damage to the plane from contact with the birds, fence and truck was minimal compared to the total destruction of the aircraft when it "crashed and sank in the navigable waters of Lake Erie * * * ." (Complaint, para. 9.)

The basic issue is whether the allegations of the complaint read in light of the undisputed facts state a case within the realm of this Court's admiralty jurisdiction. The perimeter of admiralty jurisdiction has been the subject of continuing definition by federal courts at all levels. In arguing the instant motions, the parties have briefed that area of the law extensively; the sharp difference of opinion as to how the many cases are to be interpreted demonstrates that the reach of this Court's admiralty jurisdiction is still not clearly defined.

The controversy here centers around two questions: first, What is the proper legal standard by which admiralty jurisdiction is to be tested?; and second, Does the claim in this case meet that standard? Turning to the first question, the traditional principle is well-stated in *The Philadelphia, Wilmington & Baltimore R.R. Co. v. The Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. 209 (1859):

“The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality.” (At p. 215.)

The principle as it relates to torts has come to be known as the “locality-alone” test of jurisdiction and, in its strict application, entails an inquiry only as to where the tort occurred: if upon navigable waters, the action is cognizable in admiralty; if not, then the action is without the admiralty jurisdiction of the court.

It is the “locality-alone” test of jurisdiction which plaintiffs argue to be the proper standard here and the position is supported by a myriad of cases, many of which have been cited by the plaintiffs in the briefs opposing the instant motions.

However, the Court of Appeals for the Sixth Circuit has recently considered the propriety of the “locality-alone” test and has rejected it. In *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967), the plaintiff was injured when he dived from a pier owned and operated by the defendant. There were diving boards on the end of the pier for use by swimmers, but the plaintiff apparently dived from some other portion of the pier into approximately eighteen inches of water. The claim was that the defendant was negligent in failing to erect barriers along the pier or to adequately warn of the shallow waters along the side of the pier. After finding that the tort had occurred on navigable waters, the court met squarely the

issue of whether the "locality-alone" test is the proper jurisdictional standard. Said the court:

"While the locality alone test should properly be used to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land rather than on some navigable body of water, it is here determined that jurisdiction may not be based solely on the locality criterion. A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters. Absent such a relationship, admiralty jurisdiction would depend entirely upon the fact that a tort occurred on navigable waters; a fact which in and of itself, in light of the historical justification for federal admiralty jurisdiction, is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts." (At p. 966. Citations omitted.)

In *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3rd Cir. 1963), a case relied upon heavily by the plaintiffs, the court specifically rejected the argument that some maritime nexus is needed for admiralty jurisdiction in addition to a tort which occurred on navigable waters. As noted in *Weinstein*, the argument is not a new one and the weight of authority is in favor of the "locality-alone" test. Despite this weight of authority, the *Chapman* case, *supra*, expressly binds the Sixth Circuit to the minority position which requires some maritime nexus in addition to a finding that the tort occurred upon navigable waters.

The plaintiff would read the *Chapman* case as holding that, in addition to the tort having occurred upon navigable waters, there need be a relationship between the wrong and some maritime service, navigation or commerce on navigable waters only in those "troublesome borderline cases" where there is some difficulty in determining whether or not the tort occurred upon navigable waters. This position is without merit. The opinion in *Chapman* first dealt

with the question of whether the tort in that case had occurred on navigable waters. Regarding that question, the court stated, at page 964:

“However, a number of troublesome borderline cases have arisen * * * . Without attempting to distinguish and reconcile each of the above cases, it appears that the governing principle common to all is that reference should properly be made to the locality where ‘the substance and consummation of the occurrence which gave rise to the cause of action took place * * * .’ *Minnie v. Port Huron Terminal Co.*, supra, note 8, 295 U.S. at 649, 55 S. Ct. at 885, or, as suggested in *Thomson v. Chesapeake Yacht Club, Inc.*, supra, note 5 at 558, ‘to the place where the negligent act or omission *becomes operative or effective* upon the plaintiff * * * .’ In these cases, it is apparent that application of the mechanical place of the injury or impact test is impossible, for a claimant has usually suffered some injurious impact upon both land and water.”

The court then applied the standard which it deemed appropriate to the circumstances of the case and determined that the locality of the tort was upon navigable waters. Only then did the court consider and decide that locality of the tort alone is insufficient to confer admiralty jurisdiction. This latter holding was not limited to borderline cases where the locality of the tort could not be easily ascertained.

Thus, it is the opinion of the Court that the proper procedure here is one which first looks to the threshold question of locality of the tort. If it can be found that the tort occurred upon navigable waters, then further inquiry must be made into the “condition *sub silentio*” (*Chapman*, supra), i.e., that there be some connection between the alleged wrong and some maritime service, navigation or commerce upon navigable waters. As will be set out below, in detail, the Court finds the case fails to meet both criteria.

Turning to the locality of the tort in this action, the many cases involving the crash of an airplane into navigable waters which have held the locality of the tort to be upon the water would appear to require a similar conclusion here. Cf. *Weinstein v. Eastern Airlines, Inc.*, supra; *Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3rd Cir. 1968); *Harris v. United Air Lines, Inc.*, 275 F.Supp. 431 (S.D. Iowa 1967). A most perplexing aspect of the aircraft cases has been the difficulty in defining where the tort occurred, especially in those cases where the acts of negligence alleged occurred upon or over land even though the plane came down in navigable waters. In *Thomson v. Chesapeake Yacht Club*, 255 F.Supp. 555 (D. Md. 1966), the court commented:

"The aircraft cases present special problems. Although the negligence may have occurred on land, where there was negligent maintenance, the impact (effect) of the negligence on the passengers did not occur until something went wrong during the flight and the plane started to fall. Something may have started to go wrong over the land before the plane reached the sea, but that is usually impossible to prove one way or the other in aircraft cases, and the decisions adopt a practical approach." (P. 558.)

Thus, for purposes of determining jurisdiction, even though the negligent acts occur on the land, if the impact of the tortious conduct takes place over navigable water, the cases hold that the tort "occurred" on navigable water. See *Lavello v. Danko*, 175 F.Supp. 92 (S.D. N.Y. 1959); *Weinstein v. Eastern Airlines, Inc.*, supra; *Wilson v. Transocean Airlines*, 121 F.Supp. 85 (N.D. Calif. 1954). In *Thomson v. Chesapeake Yacht Club, Inc.*, supra, the court interpreted the various cases, including those involving aircraft, with regard to the test for locality. The opinion states:

"It might be more accurate to refer to the place where the negligent act or omission becomes operative

or effective upon the plaintiff, so as to cause an injury to him, whether the physical injury and damage is suffered and completed on land or in navigable water. That is substantially the test which was applied in *The Admiral Peoples*, *The Strabo*, *Wiper* and other cases." (P. 558.)

In this case the alleged negligence occurred upon land and the damage for which recovery is sought occurred upon Lake Erie. Without looking to the other circumstances of the accident, it could be said, as plaintiffs argue, that the "impact" of the alleged negligence, with reference to the ultimate total destruction of the aircraft, occurred upon navigable waters.

However, there is no question in this case that, after the alleged negligence but before the ultimate crash into Lake Erie, the aircraft struck a number of sea gulls, that there was an immediate loss of power, that the crippled aircraft came into contact with the airport's perimeter fence, that it grazed the top of a pick-up truck parked outside the airport, and only then did the plane enter into the space above Lake Erie, eventually to crash and sink in its waters. Ignoring the fact that some comparatively small amount of damage to the aircraft must have been occasioned by its contact with the gulls, the fence and the truck, it is only by blindly applying a legal fiction that the Court could say in this case that the alleged negligence did not have its "impact" upon, or "become operative and effective" upon the plane until it crashed into the water. As noted in the *Thomson* case, *supra*, the rule which plaintiffs urge was developed in cases where it was impossible to prove whether or not something "started to go wrong over the land before the plane reached the sea * * *." (At p. 558.)

In this case it is manifest that the alleged negligence became operative upon the aircraft while it was over the land; and in this sense the "impact" of the alleged negligence

occurred when the gulls disabled the plane's engines. Turning again to the opinion of the court in *Chapman*, it is stated, at page 965:

"In cases such as *The Admiral Peoples and Wiper*, cited above (footnotes 2 and 4), the negligent act or force responsible for the injury resulted in a direct impact upon plaintiff, while the alleged negligence in the instant case was the failure to restrain appellant by means of warning signs or physical barriers from performing a voluntary act. This distinction might as [sic] first seem inconsequential, but it must be noted that where a negligent act or force knocks a person down or causes him to fall, whether he comes down on land or water is largely fortuitous."

Applying the same analysis to this case, the alleged negligence, the take-off, the striking of the gulls and resultant loss of power occurred upon the land. From this point on the plane was disabled and was caused to fall. Whether it came down upon land or upon water was largely fortuitous.

In *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir. 1965), the plaintiff's decedent was alleged to have fallen from a dock and to have died from drowning. The defendant was charged with negligence in maintenance of the dock. The court stated, at page 730:

"However, docks and wharves are considered as extensions of land, *American Export Lines, Inc. v. Revel*, 266 F.2d 82 (4th Cir. 1959); *Netherlands American Steam Nav. Co. v. Gallagher*, 282 F. 171 (2nd Cir. 1922); *The Plymouth*, 3 Wall. 20, 70 U.S. 20, 18 L.Ed. 125 (1865); *Hughes*, Admiralty (2d Ed.) Sec. 198; 2 Am. Jur. 741, 767-768, ADMIRALTY Sec. 84, and therefore the negligently maintained dock which presumably caused the decedent to fall was land, and the decedent was on land at the time he was caused to fall. Thus, the tort was complete before decedent ever

touching the water and this being true, the subsequent drowning is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages * * *."

Likewise, in this case the airport and the runway were upon land and the alleged negligence which caused the plane to crash occurred upon land. Further, the plane became disabled over land and came into contact with a fence and a truck before ever crossing the shoreline. It is this Court's opinion that the eventual crash of the plane into Lake Erie, and its destruction by water, are at best fortuitous and are significant "not to determine the maritime or non-maritime nature of this action but only as it relates to damages." (*Wiper, supra.*)

It is the opinion of the Court, therefore, that the tort in this case did not occur upon navigable waters and the action is not cognizable in admiralty. In reaching this conclusion, the Court is well aware of the many decisions holding that a plane crash into navigable waters is within admiralty jurisdiction. However, as the analysis above reveals, drawing from those cases a general rule that all plane crashes into navigable waters are cognizable in admiralty and applying such a rule here would belie the principles which governed locality of the tort before the problems peculiar to air commerce arose. Where the facts are not known, a court might rightly assume that the alleged negligence became operative and effective upon the aircraft over navigable waters; but here the alleged negligence had crippled the plane well before it reached the water. Assuming otherwise would require that the Court ignore the very facts upon which it must rely in testing jurisdiction. Without distinguishing each of the cases involving an airplane crash into navigable waters, it is sufficient to state that the undisputed facts in this case demonstrate that the tort occurred over the land.

As to the second prerequisite for admiralty jurisdiction—that there be a relationship between the alleged wrong

and some maritime service, navigation or commerce upon navigable waters—in *Weinstein v. Eastern Airlines, Inc.*, supra, the court stated:

“Assuming *arguendo* that some kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdiction, we believe nonetheless that the cases at bar are within the admiralty jurisdiction insofar as the tort claims alleged therein are concerned. At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce in or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across these same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels. ‘There can be nothing more maritime than the sea.’ *Pure Oil Co. v. Snipes*, 293 F.2d 60, 65 at n. 6 (5 Cir. 1961).” (At p. 763.)

In *Chapman v. City of Grosse Pointe Farms*, supra, the court quoted these same words from the *Weinstein* case as an example of its conclusion that some maritime nexus had been required as a condition “sub silentio” to admiralty jurisdiction by many courts which outwardly voiced adherence to the “locality-alone” test.

The Court does not view either the *Weinstein* case or the *Chapman* case as persuasive authority that there is always a relation between the alleged wrong and some maritime service, navigation or commerce on navigable waters whenever an aircraft crashes into navigable waters. In the *Weinstein* case, the statement was manifestly uttered by way of dicta; and the *Chapman* opinion cited the comment of *Weinstein* only to illustrate that other courts have been concerned with maritime nexus even while denying that

it is a prerequisite to jurisdiction. There was little indication as to how the Court of Appeals for the Sixth Circuit might rule if considering de novo the question which the court in *Weinstein* resolved by way of dicta.

In *Gowdy v. United States*, 412 F.2d 525 (6th Cir. 1969), the maritime nexus requirement of the *Chapman* case was further defined. The court emphasized in the *Gowdy* case that it is the alleged "wrong" which must bear a relationship to some maritime service, navigation or commerce on navigable waters. The plaintiff in that case was installing electrical machinery in a lighthouse when he fell from the lighthouse and sustained injuries. The court stated, at pages 528-29:

"Nor is the fact that the lighthouse itself serves a maritime purpose sufficient to require in this case application of maritime law.

.

"Here the 'wrong' if any, involved the failure of a landowner to provide a guardrail or some type of warning for business invitees using the property. The invitees were an electrical construction company and its employees engaged in the installation of new machinery in the machinery house. The company was not a maritime contractor, and its employees were not seamen, longshoremen or harbor workers.

"The 'wrong' bears no relationship whatsoever to 'some maritime service, navigation or commerce on navigable waters.' The application of maritime law in this case would not, therefore, serve the purpose of uniformity in the area of maritime commerce."

Assuming, as the court noted in the *Weinstein* case, *supra*, that air commerce bears some relationship to maritime commerce when the former is carried out over navigable waters, the relevant circumstances here were unconnected with the maritime facets of air commerce. The claimed

"wrong" in this case was the alleged failure to keep the runway free of birds and the failure to adequately warn the pilots of their presence upon the end of the runway. When the alleged negligence occurred, and when it became operative upon the aircraft, all the parties were engaged in functions common to all air commerce, whether over land or over sea.

There is no contention here that the entire spectrum of air travel is imbued with a maritime character merely because some airplanes at certain times might pass over navigable waters. Thus, the conclusion here must be that the operative facts of the claim in this case are concerned with the land-connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off. It is the Court's opinion that there exists no relationship between the "wrong" alleged in this case and some maritime service, navigation or commerce upon navigable waters.

For the reasons stated above, the case is not cognizable in admiralty.

There appearing in the complaint no allegations upon which jurisdiction might be based other than the averment that the case falls within the admiralty and maritime jurisdiction of the Court, the Court has no jurisdiction over the subject matter of the action as alleged. The complaint must, therefore, be dismissed.

As to the third-party action against the United States of America filed by defendants City of Cleveland and Phillip A. Schwenz, it also must be dismissed. The third-party complaint seeks relief against the third-party defendant only if, and to the extent that the defendants City of Cleveland and Phillip A. Schwenz are held liable to the plaintiffs in the main action. An affirmative claim has been asserted by the third-party defendant against the plaintiffs and, in this action, the plaintiffs have made no claim directly

against the third party-defendant. Thus there is no conceivable need, purpose or requirement for the Court to retain jurisdiction over the third-party action after dismissal of the original action. See Moore's Federal Practice ¶ 14.26, at pp. 707 et seq.

Defendant Howard E. Dicken has asserted immunity from suit, in addition to lack of admiralty jurisdiction, as a ground for dismissal of the complaint as to him. The issue of immunity need not be decided in view of the Court's opinion on the jurisdictional issue.

It Is ORDERED, therefore, that the complaint is dismissed for lack of jurisdiction over the subject matter.

It Is FURTHER ORDERED that the third-party action is dismissed.

GIRARD E. KALBFLEISCH
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-678

EXECUTIVE JET AVIATION, INC., et al.,
Petitioners,

v.

CITY OF CLEVELAND, OHIO, et al.,
Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**BRIEF OF RESPONDENTS CITY OF CLEVELAND,
OHIO AND PHILLIP A. SCHWENZ**

QUESTIONS PRESENTED

The statement of the question by petitioners is unacceptable. The case presents the following questions for review.

1. Whether the district court and court of appeals correctly held the case not cognizable in admiralty when they found on undisputed evidence that the tort occurred on land, where a private jet aircraft, taking off from the municipal lakefront airport in Cleveland, suffered an immediate total loss of power by ingesting a large number of birds that were on the runway, struck a truck and then a fence—all on

land—before coming to rest in the waters of Lake Erie.

In the event the foregoing question is answered affirmatively, no other question is presented on this appeal. Should the question be answered in the negative, the Court will then need to consider—

2. Whether, in any case, admiralty jurisdiction can exist if the tort bears no relationship to any maritime service, navigation or commerce upon navigable waters.

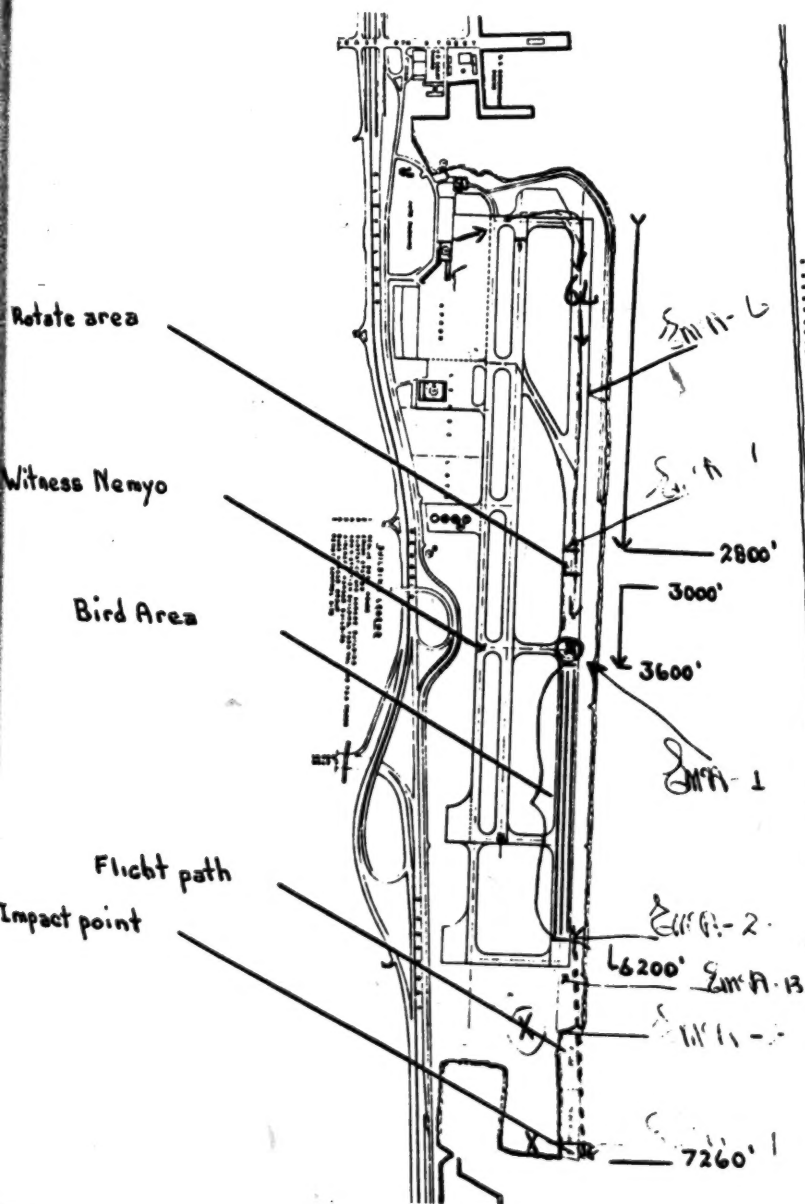
The district court held there was no admiralty jurisdiction in either case. The court of appeals, having held the case not cognizable in admiralty because the tort that caused loss of the aircraft occurred on land, did not reach the second question.

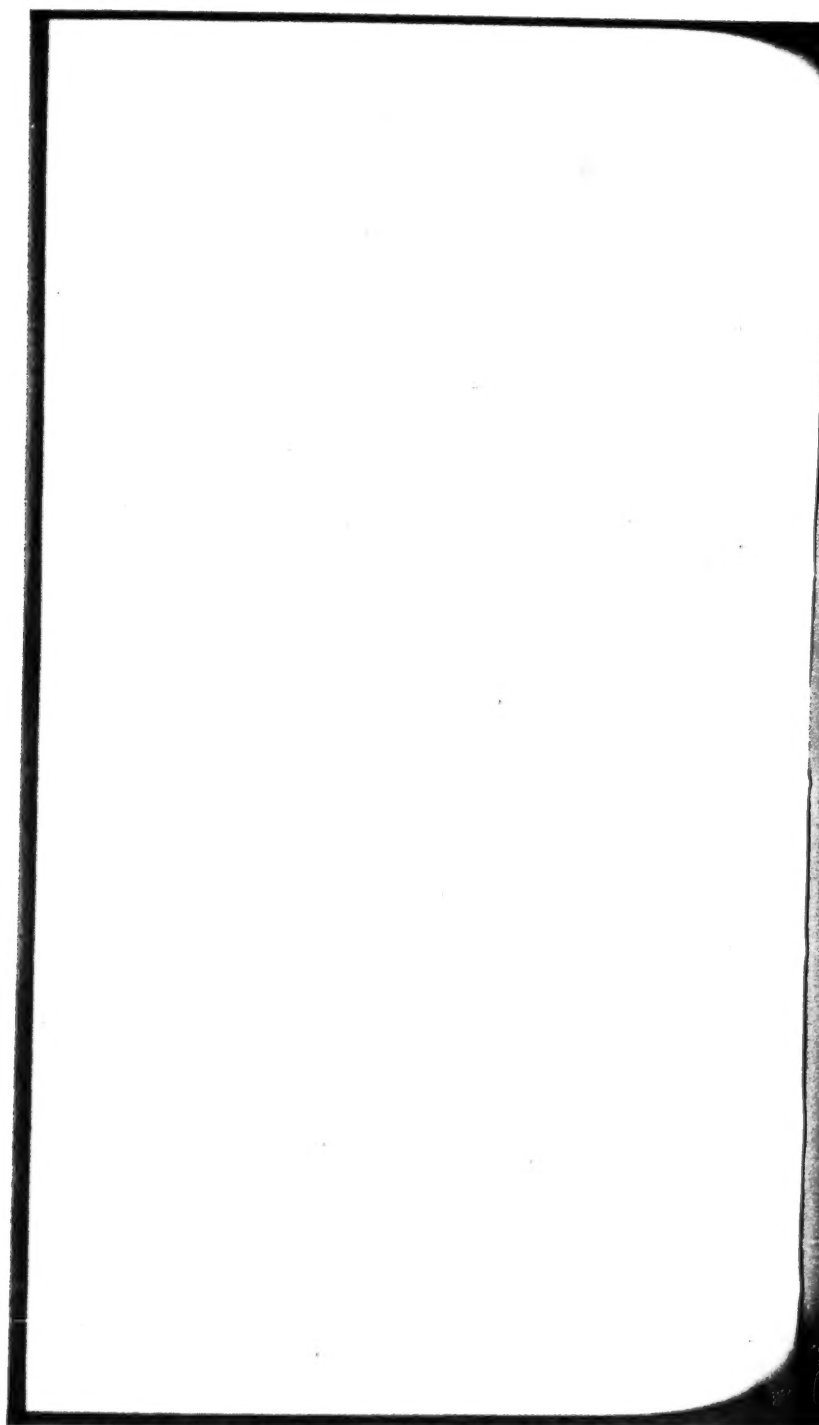
STATEMENT OF THE CASE

This action arises out of the crash of a Falcon jet aircraft owned by petitioner Executive Jet Sales, Inc. and operated by petitioner Executive Jet Aviation, Inc. The crash occurred on July 28, 1968 as the plane was taking off from Burke Lakefront Airport in Cleveland, Ohio, adjacent to the navigable waters of Lake Erie, on a ferry flight to Portland, Maine. (R. 13.)¹

Attached is a map of the airport where the accident occurred. It is a copy of Plaintiffs' Exhibit 4 at the deposition of Edward J. McAvoy, the chief investigator of this accident for the National Transportation Safety Board. (Ph. 2.) Superimposed on it in red is the runway number 6L. In all other respects the map is as marked by McAvoy at the instruction of counsel for petitioners.

1. (R. —) refers to the Appendix to Briefs; (Ph. —) refers to the Appendix of Photographic Exhibits.





**—Pilots Were Warned
of Birds on Runway.**

As the jet taxied out to runway 6L for takeoff there was a large flock of birds on that part of the runway marked "Bird Area" on the map. (R. 14, 18-19, Ph. 1.) Respondent Dicken, the air traffic controller in the airport control tower, warned the pilots by radio, "Caution, birds on end of runway." (R. 14.) "It looks like there are a million of them." (R. 31, 36, 37, 38.)

Ignoring that warning, the pilots commenced their takeoff and continued until the plane was rotated at a speed of approximately 125 knots (R. 14)—i.e., the nose was rotated upward so the plane would become airborne. At that point "a sea of birds on the runway became visible" to the pilots. (R. 14.)

**—Bird Strike Which Precipitated
Accident Occurred Over Land.**

As the plane approached the birds at an altitude of approximately 75 feet above the runway, it "caused them to flush and fly into the aircraft, apparently hundreds hitting the belly and engine intakes." (R. 14.)

It is undisputed that the aircraft was struck by the birds while over the runway—i.e., over land. This is made clear not only by the pilots' statement (R. 14), and McAvoy's map showing the area over runway 6L where the bird strike occurred (Ph. 2), but also by the presence of some 314 dead birds on the runway, not counting those which remained in the engine air intakes. (R. 18-19, Ph. 1.)

**—Bird Strike Caused Engine Damage
Resulting in Immediate Total Loss
of Power.**

When the many birds struck the jet and its engine air intakes, *"There was almost immediate total loss of power."* (R. 14.) The power loss caused by the bird strike precipitated the ensuing sequence of events. And it is on the bird strike that petitioners predicate their claims. (R. 4.)

The reason for the immediate total loss of power is apparent in the testimony of McAvoy where, in response to questions by petitioners' counsel, he described the damage he observed to the plane's two engines resulting from the bird strike (R. 25-27):

A. Examination of both engines, I recorded there was a dent in the nose cone position.

The guide veins were damaged to a slight degree.

* * * * *

In that lines were not in their normal configuration.

Q. What did you observe with regard to their abnormal configuration? A. They were bent.

Q. Tell us how they were bent, what you observed with regard to them being bent. A. The guide veins were bent to various angles.

Q. Were there any other observations with regard to the engines? A. The first stage compressor rotator blades were bent.

Q. Were there any other observations with regard to the engines? You can go right ahead, if you like, with all of your observations that you have recorded either there, or that you remember. A. The first stage stator blades, and the second stage rotor blades were bent and torn.

* * * * *

The Witness: *The compressor area of the jet engine was filled with bird debris.* By visual examination of the engine I saw a percentage of the fan rotor secondary air files were missing. The blades that were not missing, that were present, were bent and ripped.

The exit guide veins leading edges had bends and tears.

Examination of the starboard engine, I saw three dents in the nose cone.

The guide vein was missing at 2:00 o'clock position. The guide vein was wedged between the first stage rotor and first stage stator blades at the 5:00 o'clock position.

The first stage stator blades were damaged—were out of configuration because of their proximity to the first stage rotor blades.

All the visible compressor rotor blades that I saw had extensive bending and metal tearing.

In the forward area of this engine I saw bird debris.

In my aft view of the engine 75 per cent of the fan rotor secondary air files were missing. The remaining blades were bent and torn.

One exit guide vein was missing. The guide veins that were present were bent and torn.

—Plane Next Struck Truck and Airport Perimeter Fence.

The immediate total loss of power resulting from the bird strike caused the plane to descend in a semi-stalled attitude until it struck a truck parked at the end of the runway and then the airport perimeter fence. (R. 14.) That point was marked by McAvoy on his map as

"EMcA13." (Appendix to the Briefs in Court of Appeals, p. 56.)

Plaintiffs' Exhibit 42 (Ph. 5), a photograph taken by McAvoy, shows the damage to the truck and fence as a result of being struck by the jet. Plaintiffs' Exhibit 37 (Ph. 4) shows the damaged fence.

**—Plane Finally Came
to Rest in Water.**

After striking the truck and then the fence the plane continued on until it landed on the water a short distance off the end of the runway. (R. 14.) The point where the plane came to rest on the water was marked by McAvoy on his map with the designation "Impact Point." (R. 20.) The dotted line drawn on the map by McAvoy designated the approximate path of the plane from the time it struck the fence until it reached the final resting place. (R. 22-23.)

The plane floated approximately 5 to 10 minutes before it sank. (R. 15.) "The crew returned to the airport and there were no injuries." (*Ibid.*)

—In Summary.

The foregoing facts establish the absence of admiralty jurisdiction. They demonstrate that—

- The bird strike which precipitated the entire accident occurred over land.
- The bird strike caused extensive damage to the plane's engines resulting in an immediate total loss of power.
- The plane descended in a semi-stalled attitude over land until it struck the truck and then the fence at the northeast end of runway 6L.

—It was purely fortuitous that the plane came to rest in the waters of Lake Erie rather than on the adjacent land.

—District Court Held Action Not Cognizable in Admiralty Because Tort Occurred Over Land and There Was No Maritime Nexus.

The district court set out the pertinent facts, noting that "[t]here is no genuine issue as to any of the facts set out above." (Pet. for Cert. 31a.) Based on these facts the district court found that "it is manifest that the alleged negligence became operative upon the aircraft while it was over the land." (*Id.* at 36a.) "Whether it came down upon land or upon water was largely fortuitous." (*Id.* at 37a.) The court concluded that "the undisputed facts in this case demonstrate that the tort occurred over the land." (*Id.* at 38a.) Hence, "the tort in this case did not occur upon navigable waters and the action is not cognizable in admiralty." (*Ibid.*)

The district court also found that "the operative facts of the claim in this case are concerned with the land-connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off. It is the Court's opinion that there exists no relationship between the 'wrong' alleged in this case and some maritime service, navigation or commerce upon navigable waters." (*Id.* at 41a.)

There being no basis for federal jurisdiction other than in admiralty, and having found the case not cognizable in admiralty, the district court dismissed the action. Thereafter petitioners refiled the case in state court where it now pends.

**—Court of Appeals Affirmed on Ground
Tort Occurred on Land.**

The Court of Appeals for the Sixth Circuit affirmed on the sole ground that "the alleged tort occurred on land, even though the plane fell into navigable waters shortly after take off from the airport, and that no right of action is cognizable in admiralty." (Pet. for Cert. 1a.) The appellate court did not reach the question of maritime nexus, saying (*Id.* at 6a):

Since we agree with the District Court that the alleged tort in this case occurred on land before the aircraft reached Lake Erie, and since admiralty jurisdiction does not extend to torts committed on land, it is not necessary to consider the question of maritime relationship or nexus discussed by this court in *Gowdy v. U. S.*, 412 F.2d 525, 527-29 (6th Cir.), cert. denied, 396 U.S. 960, and *Chapman v. City of Gross Pointe Farms*, 385 F.2d 962, 966 (6th Cir.). See *Nacirema v. Johnson*, 396 U.S. 212, 215, n. 7; *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 58-60; *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727, 729-31 (6th Cir.).

SUMMARY OF ARGUMENT

Maritime law governs only those torts occurring on navigable waters. It does not apply to torts which occur on land. *Victory Carriers v. Law*, U.S., 30 L. Ed. 2d 383 (1971).

Decisions of this Court establish the basic principle that for purposes of determining admiralty jurisdiction the locus of a tort is that place where the negligence of the defendant first becomes operative or effective on

plaintiff's property. The tort is deemed to occur where the impact of the act or omission produces such injury or damage as to give rise to a cause of action.

That principle is expressed in the three cases on which the court of appeals relied for its decision that the tort in this case occurred on land. *Smith & Son v. Taylor*, 276 U.S. 179 (1928); *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935) and *The Admiral Peoples*, 295 U.S. 649 (1935). The principle is also basic to the decisions of this Court in *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865) and *Vancouver Steamship Co., Ltd. v. Rice*, 288 U.S. 445 (1933).

The courts of appeals and district courts which have considered the question have also held that the locus of a tort is "the place where the negligent act or omission becomes operative or effective upon the plaintiff." *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962, 964 (6th Cir. 1967). "A tort is deemed to occur . . . where the impact of the act or omission produces such injury as to give rise to a cause of action." *Watz v. Zapata Off-Shore Company*, 431 F.2d 100, 109 (5th Cir. 1970).

None of the authorities cited by petitioners is contrary to this principle. Even *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963, cert. denied, 375 U.S. 940 (1963)), on which petitioners primarily rely, recognizes that "the tort is deemed to occur . . . where the impact of the act or omission produces such injury as to give rise to a cause of action." (*Id.* at 765.) *Weinstein* is not contrary to the decision by the court of appeals in this case. Analysis of the record before the Third Circuit in *Weinstein* shows that the tort there occurred on water and that fact was not in dispute. Here the uncontroverted facts show the tort occurred on land.

Application of the established principle to the undisputed facts found by the courts below demonstrates that the tort here occurred on land. The negligence of which petitioners complain was in respondents permitting a bird hazard to exist on the airport runway, in failing to remove that hazard and in failing to warn petitioners' pilots of its existence. The place where such negligence became operative or effective on petitioners' jet was over the runway when the birds struck the aircraft causing the immediate total loss of power which precipitated the crash. It was at that point—over land—that the acts or omissions of respondents produced such damage to the jet as to give rise to a cause of action—even if the plane had been able to land without any further injury.

Common sense requires that the established principle of tort locality be applied to this case. There is no justification for carving out an exception to that principle applicable to aircraft tort cases. To do so would spawn litigation, breed uncertainty and create unnecessary complexities in the law. The established principle is well understood by bench and bar. It is readily applied to air crash cases as was done by both of the courts below.

Should this Court conclude that the district court and court of appeals correctly decided the locus question, it need go no further. If the Court should find, however, that the tort here had a maritime locus it will then need to determine whether a maritime nexus is also a requisite for admiralty jurisdiction and, if so, whether the wrong in this case bears a relationship to some maritime service, navigation or commerce on navigable waters.

The question whether a maritime nexus is required for a tort action to be cognizable in admiralty has not been decided by the Court. A thorough and scholarly

analysis of that question has been made by the AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). There a distinguished group of reporters, consultants and an advisory committee which included four United States Courts of Appeals judges recommended rejection of the "locality alone" test adopted by the Third Circuit and adoption of the maritime nexus requirement expressed in decisions of the Fifth and Sixth Circuits.

The logic of the analysis by the American Law Institute is unanswerable. This Court should hold that admiralty jurisdiction over torts is dependent not only on a maritime locus of the tort but that there must also exist a relationship between the wrong and some maritime service, navigation or commerce on navigable waters.

The requisite maritime nexus does not exist in this case. The wrong here—respondents' failure to remove the birds from the airport runway or warn petitioners' pilots of their presence—has no conceivable relationship to maritime affairs.

Admiralty law is a body of law that has grown up over many centuries for disposing of controversies arising out of the operation and navigation of vessels. It grew up under the civil law. It is concerned with ships and vessels, maritime liens, the general average, captures and prizes, limitation of liability, maritime insurance, claims for salvage, seamen's remedies, maintenance and cure—matters which have no bearing whatever on the operation of aircraft—whether over land or sea.

The principles found in admiralty law are well suited to the resolution of questions which arise out of nautical accidents. But they are wholly inapplicable to the adjudication of issues which arise in aircraft tort cases. There

are essentially two issues in air crash cases—liability and damages. Liability may be predicated on pilot error, faulty design, manufacture, testing or maintenance of the plane or one or more of its many components or on the negligence of airport operators, control tower operators or air traffic control. These are all highly complex questions in which the principles of admiralty law have no bearing and can afford no assistance. The Federal Aviation Regulations (14 C.F.R. Chapter I) do afford a body of rules directly applicable to air crashes. It makes much more sense to apply these rules than to hold that aviation tort litigation be governed by admiralty law, but only in those cases where the plane comes to rest in navigable waters.

There is no justification for applying maritime law to the determination of damages. Damages arising from air crashes resulting in personal injuries, death or property damage can and should be determined by the same rules of law applicable to other tort actions.

The uniformity petitioners purport to seek would not result from the application of admiralty law in this case. Applicable law would then be made to depend on the purely fortuitous circumstance whether the plane came to rest on land or navigable waters.

Bills have been introduced in recent sessions of the Congress which would provide for federal jurisdiction and a body of uniform federal law in cases arising out of aviation and space activities. Such bills have been critically received. None has been enacted.

If a uniform federal law applicable to air crash cases *should* be found desirable, such a law should be enacted by Congress, not imposed by judicial decree. Such a law should be applicable to *all* aviation accidents, not just those where the plane comes to rest in navigable waters.

We urge the Court to reject petitioners' ill-considered proposal—to declare the general principle of tort locality applicable to the present case—to hold that the case is not cognizable in admiralty because the tort occurred on land and, in any event, there was no relationship between the wrong and some maritime service, navigation or commerce on navigable waters.

ARGUMENT

I. THE ACTION IS NOT COGNIZABLE IN ADMIRALTY BECAUSE UNDISPUTED FACTS SHOW THE TORT OCCURRED ON LAND.

Maritime law governs only those torts occurring on the navigable waters of the United States. Accidents on land are not within the maritime jurisdiction of federal courts. The only exception to that rule arises under the Admiralty Extension Act of 1948 (46 U.S.C. § 740) which is not here applicable.

Thus in the recent case of *Victory Carriers v. Law*, U.S., 30 L. Ed. 2d 383 (1971), this Court observed (30 L. Ed. 2d at 387):

The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States.

And further noted (*Id.* at 388):

But, accidents on land were not within the maritime jurisdiction as historically construed by this Court.

After reviewing the decisions supporting the rule, the Court concluded (*Id.* at 391):

We are not inclined at this juncture to disturb the existing precedents and to extend shoreward the reach of the maritime law further than Congress has approved. We are dealing here with the intersection of federal and state law. As the law now stands, state law has traditionally governed accidents like this one. *To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved to state law, would raise difficult questions concerning the extent to which state law would be displaced or preempted, and would furnish opportunity for circumventing state workmen compensation statutes. In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts.*

The question in the case at bar then is where did the tort occur. If the tort occurred on land—as the district court and court of appeals found—the case is not cognizable in admiralty. On the undisputed evidence the tort here *did* occur on land because the alleged negligence of respondents became operative on the aircraft while it was over land and hence—

- The locus of the tort on land is supported by prior decisions of this Court.
- Decisions of the courts of appeals and district courts also support the non-maritime locus of the tort.
- There are no decisions which applied to the facts here would give the tort a maritime locus.

—Common sense requires the application of established principles to this case.

A. Decisions of This Court Support Holding That Locus of Tort Was on Land.

The decisions of this Court establish the principle that for purposes of determining admiralty jurisdiction the locus of a tort is that place where the negligence of the defendant first becomes operative or effective on the person of the plaintiff, in cases of personal injury, or on plaintiff's property, in cases, as here, where recovery is sought for property damage. Put another way, the tort is deemed to occur where the impact of the act or omission produces such injury or damage as to give rise to a cause of action.

Applying that principle to the facts of this case, the alleged negligence of respondents became operative on the jet when it was struck while over land by a large number of birds, damaging its engines to the extent that there was an immediate total loss of power, thus precipitating the ensuing events. At that moment the bird strike alone gave rise to a cause of action—indeed, it would have given rise to a cause of action even if, miraculously, the plane had been able to land without further damage. The only difference would be in the amount of damages that might be recovered. Hence the locus of the tort was over land.

The court of appeals relied principally on three decisions of this Court for its conclusion that the tort occurred on land—*Smith & Son v. Taylor*, 276 U.S. 179 (1928); *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935) and *The Admiral Peoples*, 295 U.S. 649 (1935).

In *Smith & Son v. Taylor*, a longshoreman employed in unloading a vessel at dock was standing on the wharf (deemed to be an extension of the land) when he was struck by a sling loaded with cargo and knocked into the water where he was later found dead. The widow brought an action for his death under the state compensation law and recovered a judgment which was affirmed in the court of appeals. It was defendant's claim that the case lay within the admiralty jurisdiction of the court and hence the state compensation law did not apply. The issue thus before this Court was delineated as follows (276 U.S. at 181):

If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within the admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violated § 2 of Art. 3. But, if the cause of action arose upon the land, the state law is applicable.

The contention of the defendant was summarized by the Court (*Id.* at 182):

It [the defendant] argues that as no claim was made for injuries sustained while deceased was on land and as the suit was solely for death that occurred in the river, the case is exclusively within the admiralty jurisdiction.

Note that this is precisely the basis on which petitioners seek to invoke admiralty jurisdiction in the case at bar. They contend that their plane—after striking the flock of birds over the runway and being crippled by the immediate loss of all power from its engines, and after striking the truck and fence at the end of the runway—finally landed in the waters of Lake Erie a short distance off the end of the runway where it finally sank

and was totally destroyed. Thus, they say, since the suit is one for damages sustained when the plane sank in the lake, the case is one of admiralty jurisdiction.

This Court, however, rejected that contention, pointing out that "this is a partial view that cannot be sustained." (*Ibid.*) The Court continued (*Ibid.*):

The blow by the sling was what gave rise to the cause of action. *It was given and took effect while deceased was upon the land.* It was the sole, immediate and proximate cause of his death. *The G. R. Booth*, 171 U.S. 450, 460. *The substance and consummation of the occurrence which gave rise to the cause of action took place on land.*

In the present case it could likewise be said that the impact of the birds on the plane and its engines was "what gave rise to the cause of action." That event "took effect while [the plane] was upon the land." It was "the sole, immediate and proximate cause of [the crash] . . . The substance and consummation of the occurrence which gave rise to the cause of action took place on land."

The converse of the factual situation in *Smith & Son* came before this Court in *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935), where a longshoreman was working on the deck of a vessel when he was struck by a swinging hoist and knocked onto the wharf. Observing that, "We had the converse case before us in *Smith & Son v. Taylor*, 276 U.S. 179" (*Id.* at 648), the Court held the case one of admiralty jurisdiction, because (*Id.* at 649):

If, when the blow from a swinging crane knocks a longshoreman from the dock into the water, the cause of action arises on the land, it must follow,

upon the same reasoning, that when he is struck upon the vessel and the blow throws him upon the dock the cause of action arises on the vessel.

In *The Admiral Peoples*, 295 U.S. 649 (1935), a passenger fell from the ship's gangplank to the dock, sustaining injuries in the fall. The question before this Court was whether the libel had properly been brought in admiralty, since "Where the cause of action arises upon the land, the state law is applicable." (*Id.* at 651.)

The Court held that "the gangplank was part of the ship, and the cause of action in admiralty." (*Syl.*) The Court noted that (*Id.* at 653):

[T]he Circuit Court of Appeals said: "*The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water.*"

Here too the cause of action originated and the damage to the jet had commenced on the airport, "the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the [land] or in the water."

Petitioners rely on *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865), in support of their contention that the tort here occurred on the water. On the contrary, however, *The Plymouth* is entirely consistent with the three cases noted above. Analysis of the decision demonstrates that applied to the facts at bar it places the locus of the tort on land.

In *The Plymouth* negligence committed on board a ship tied up to a wharf caused a fire aboard ship which

spread to the wharf and surrounding buildings. A libel was filed against the owners of the vessel to recover for the damage to the wharf and buildings. This Court held the tort occurred on land and the case was not cognizable in admiralty. To be sure, as the Court observed, "The origin of the wrong was on the water." (*Id.* at 33). But the Court concluded that "the substance and consummation of the injury [was] on land." (*Ibid.*) It is obvious that the place where the wrong became operative on libelants' property (the wharf and buildings) was on land. Libelants had no cause of action when the fire was started aboard ship, but only when the fire took effect on their property. It was there—on land—where the tort occurred and that is exactly consistent with the holding of both lower courts in the case at bar.

Petitioners deride the three decisions of this Court on which the court of appeals relied as "two longshoremen's compensation cases dated 1928 and 1935 . . . and one gangplank slip-and-fall case dated 1935." (Brief for Petitioners, p. 41.) They describe these decisions as "inconclusive, as well as outdated, authority." (*Id.* at 49.)

The fact is, however, that the principle established by these three cases is as sound today as it was when they were decided. Such changes as have taken place in the law applicable to longshoremen have not affected the validity of the principle that the locus of a tort is that place where the wrong becomes operative on the person or property of the plaintiff—the place where the impact of the wrong produces such injury or damage as to give rise to a cause of action. Thus in the recent opinion in *Victory Carriers v. Law*, U.S., 30 L. Ed. 2d 383 (1971), this Court cited both *Smith & Son v. Taylor* and *Minnie v. Port Huron Terminal Co.* with approval.

This principle was also followed in *Vancouver Steamship Co., Ltd. v. Rice*, 288 U.S. 445 (1933). A stevedore, hit aboard the vessel by a falling sling of lumber, was taken ashore where he died one hour later. The administratrix "electing under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 933) to assert her claim against a third party, filed a libel in admiralty." (*Id.* at 446.) This brought objection that admiralty had no jurisdiction because the cause of action depended on the Oregon Wrongful Death Act and therefore did not, and could not, arise "until death actually occurs." (*Id.* at 445.) Since death came on shore, it was urged "that the cause of action arose on land" (*Id.* at 447) and "the admiralty court was without jurisdiction." (*Id.* at 445.) This Court rejected the argument because (*Id.* at 447):

The right to recover for death depends upon the law of the place of the act or omission that caused it and not upon that of the place where death occurred.

**B. Decisions of the Courts of Appeals
and District Courts Demonstrate That
Locus of Tort Was on Land.**

The principle expressed in the decisions of this Court discussed above has also been followed by the courts of appeals and district courts. Thus in *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir. 1965), cert. denied, 382 U.S. 812 (1965), the decedent was alleged to have fallen from a dock and to have died from drowning due to the negligent maintenance of the dock. The court of appeals held that there was no maritime jurisdiction because the tort occurred on the dock—considered an extension of land—even though the death by drowning occurred in the water. The court reasoned (*Id.* at 730):

[T]he negligently maintained dock which presumably caused the decedent to fall was land, and the decedent was on land at the time he was caused to fall. Thus, the tort was complete before decedent ever touched the water and this being true, the subsequent drowning is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages.

Applying *Wiper* to the present facts, petitioners' aircraft was over land when it was caused to fall. The tort was thus complete before the plane ever touched the water. That being true the subsequent immersion of the plane "is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages." (340 F.2d at 730.)

Similarly, in *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967), the court recognized that the governing principle in determining the locus of a tort is that reference should properly be made "to the place where the negligent act or omission becomes operative or effective upon the plaintiff." (*Id.* at 964.)

In *Watz v. Zapata Off-Shore Company*, 431 F.2d 100 (5th Cir. 1970), the court stated (*Id.* at 109):

A tort is deemed to occur not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action.

It is significant that while there was no question raised concerning the locus of the tort in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963), the court recognized the general principle governing the determination of tort locality as follows (*Id.* at 765):

In applying the "locality" test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action.

The principle has also been adopted by district courts in the following cases: *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Calif. 1954); *Middleton v. United Aircraft Corporation*, 204 F. Supp. 856 (S.D.N.Y. 1960); *David Crystal, Inc. v. Cunard Steam-Ship Company*, 223 F. Supp. 273 (S.D.N.Y. 1963); *Thomson v. Chesapeake Yacht Club, Inc.*, 255 F. Supp. 555 (D. Md. 1966); *McCall v. Susquehanna Electric Company*, 278 F. Supp. 209 (D. Md. 1968); *O'Connor & Company v. City of Pascagoula, Mississippi*, 304 F. Supp. 681 (S.D. Miss. 1969); *Howmet Corporation v. Tokyo Shipping Co.*, 320 F. Supp. 975 (D. Del. 1971); *Dudley v. Bayou Fabricators, Inc.*, 330 F. Supp. 788 (S.D. Ala. 1971).

**C. Petitioners' Authorities Do Not Support
Any Exception to the Established Principle.**

None of the decisions cited by petitioners is contrary to the principle enunciated in the foregoing decisions. Not one of petitioners' authorities would fix the locus of the tort at any place other than that at which the wrong became operative or effective on petitioners' aircraft.

Petitioners rely principally on the decision in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963), cert. denied, 375 U.S. 940 (1963). They claim *Weinstein* is in direct and irreconcilable conflict with the decision of the court of appeals in the present case.

This is simply not true. On the facts before the court in *Weinstein* the crash there occurred on the navigable

waters of Boston Harbor and the tort thus had a maritime locus. This is diametrically opposite to the facts here where the tort clearly occurred on land.

To appreciate fully the basis of the *Weinstein* decision it is necessary to review briefly the background of the case as disclosed by the record on file in the Third Circuit. The matter came before the district court on exceptions of defendant Eastern Air Lines to the libel on the grounds that (*Weinstein* R. 31a):²

The facts averred in the Libel do not constitute a cause of action against Eastern Air Lines, Inc., within the admiralty jurisdiction of this Court.

and

This Court does not have jurisdiction in admiralty against Eastern Air Lines, Inc. by reason of the allegations that the place of the crash was within the territorial waters of the Commonwealth of Massachusetts.

It is thus apparent that the *only* facts before the district court and the court of appeals in *Weinstein* were the allegations of the libel. Paragraph 9 of the libel alleged (*Weinstein* R. 5a):

Shortly after the said aircraft had become airborne, following take-off from the said airport, by reason of the negligence of the respondents, and each of them, and by virtue of their respective breach of warranties said aircraft crashed into the navigable waters of Boston Harbor, causing libellant's decedent to suffer severe and disabling injuries resulting in his death.

2. References to the printed appendix in the *Weinstein* case on file in the United States Court of Appeals for the Third Circuit will be designated as (*Weinstein* R. __a).

Eastern admitted in its answer "that said aircraft crashed into an inlet or body of water on or about the date averred and that libellant's decedent was killed." (Weinstein R. 25a.)

The district court had before it only the allegation, admitted by Eastern, that the aircraft had crashed into the navigable waters of Boston Harbor causing decedent's death. Consequently court and counsel accepted the fact that the locus of the tort was on navigable water and the only question presented for decision by the district court was whether that fact alone was sufficient to confer admiralty jurisdiction on the court or whether it was also necessary to find a maritime nexus as a basis for admiralty jurisdiction.

The district court, after careful review of the authorities, concluded that not only a maritime locality but "some maritime connection is necessary for admiralty jurisdiction." *Weinstein v. Eastern Airlines, Inc.*, 203 F. Supp. 430, 433 (E.D. Pa. 1962). Since the district court found no maritime nexus it sustained Eastern's exceptions and dismissed the libel.

The Court of Appeals for the Third Circuit took a different view, however, and reversed the decision of the district court because (316 F.2d at 761):

The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; i.e., the place where it happened. *If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required.*

Petitioners contend that the actual facts in the Boston Harbor crash were similar to those in the present case

and hence a conflict exists. Whether that is true or not is beside the point. The fact is that neither the district court nor the court of appeals in *Weinstein* had any facts of record other than the admitted allegation that after take off the plane crashed into the navigable waters of Boston Harbor—thus the location of the tort was maritime.

In the present case, however, the facts of the crash are established by undisputed evidence. These facts show beyond any question that the place where the tort occurred was over land. The cases are thus clearly distinguishable.

To be sure, there is admittedly a conflict between the Third and Sixth Circuits as to the requirement of a maritime nexus. In *Weinstein* the Third Circuit held that a maritime location alone is sufficient to establish admiralty jurisdiction. "[N]othing more is required." (*Ibid.*) The Sixth Circuit has held in other cases—though it did not reach this point in the present case—that in addition to a maritime locus there must be a maritime nexus; i.e., "A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters."³

This conflict may well be one which should be resolved by this Court. But *this* case does *not* present a record on which the conflict can be decided. The judgment of the Sixth Circuit here does *not* conflict with *Weinstein* or any other court of appeals decision.

Petitioners have cited a number of cases of aircraft crashes in navigable waters wherein the courts held them cognizable in admiralty, and have suggested to the Court

3. *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962, 966 (6th Cir. 1967); *Gowdy v. United States*, 412 F.2d 525 (6th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

that a conflict exists between such decisions and the results below. Examination of these decisions, however, will disclose that in each case the tort occurred on or over navigable waters.

The cases cited by petitioners fall into two categories. First are those cases in which the court has adopted the "locality alone" test and held admiralty jurisdiction to rest on the sole fact that the tort occurred on navigable waters—not true in this case. Second are those cases arising under the Death on the High Seas Act (46 U.S.C. § 761) which by its very nature is not applicable in this case.

**D. Common Sense Requires Application of
Established Principle in This Case.**

The chain of events surrounding this accident is spelled out by undisputed evidence. The only question is at what point in this chain of events the alleged tort occurred. Petitioners contend—and we agree—that a tort does not occur at the time or place of a negligent act or omission alone. Negligence unproductive of injury does not give rise to any cause of action and no tort comes into being at that stage of events.

The well settled principle is that the tort occurs where the wrong becomes operative or effective on petitioners' property so as to cause some damage sufficient to give rise to a cause of action. In the present case that point was reached while the plane was over land.

Petitioners contend, however, that in aircraft crash cases the tort does not occur until the damage resulting from the negligent act or omission is complete or that the locus of the tort is that place where the major amount of damage occurs.

This Court will have to decide whether the district court and court of appeals correctly held that the tort occurred over land. In reaching that decision there are three alternative courses the Court might take:

1. The Court might, and should, reaffirm the established principle of law stated above, apply that principle to the present facts and hold—as did the courts below—that the locus of this tort was on land.
2. The Court might reject the established principle and enunciate a new doctrine for determining the locus of a tort applicable to all cases. Surely there is no reason for adopting such a radical approach. There is no suggestion in any of the authorities that the presently established principle has not worked well or that it has resulted in injustice or has been difficult to apply. Rejection of the established principle would create utter confusion in the law and would require years of litigation to resolve. Even petitioners do not advocate such an approach.
3. The Court might—if it were to follow petitioners' urging—reaffirm the established principle in its general application, but carve out an exception for airplane accident cases. Petitioners say this is necessary because airplane cases differ from cases of injured swimmers, longshoremen and gangplank slip-and-fall cases. But automobile accident cases are also different, yet it would be absurd to say that if two cars were to collide on a bridge over navigable waters and one of them were thrown into the water, that an action for damage to that car would lie in admiralty simply because the car came to rest in navigable waters, or because the major damage resulted from its immersion. Each case presents its own particular

facts, but the basic principle applicable to those facts remains unchanged. Petitioners suggest no valid reason why an exception to the general rule should be made in airplane cases other than that it would produce here the result they seek.

Petitioners argue that "Injecting an outdated and amorphous test from aberrant longshoremen's compensation cases into the area of aviation and space admiralty cases will spawn litigation, create unnecessary complexities and engage the courts in metaphysical exercises to determine where 'the substance and consummation of the occurrence which gave rise to the cause of action took place.'" (Brief of Petitioners, p. 13.) But petitioners do not offer any reason or evidence in support of that contention. Quite the contrary, the law is now well settled. The established principle is well understood by both bench and bar. It can be readily applied to air crash cases as both the district court and court of appeals did here. On the other hand, if an exception to the general rule were carved out for airplane cases as petitioners urge, such an exception would indeed spawn litigation, breed uncertainty in the law and create unnecessary complexities.

Suppose, for example, two planes were to collide in mid-air over land; one were to plummet to the land below while the other were to crash into navigable waters near the shore. If each owner were to sue the operator of the other plane for his property damage, would the locus of the tort as to one plane be on land, the other on water—would one suit be controlled by state law, the other by admiralty law? That is the absurd result that would follow from adoption of the exception urged by petitioners.

Of course, if the objective is to attain certainty in the law, the surest way to achieve that result is to declare

that aircraft accident cases are not governed by admiralty law (other than as provided by statute in the Death on the High Seas Act, 46 U.S.C. § 761) no matter where the tort or crash may have occurred. Should this Court reach such point, that is exactly what the Court should do as we shall now demonstrate.

II. EVEN IF TORT OCCURRED ON WATER, ACTION IS NOT COGNIZABLE IN ADMIRALTY BECAUSE ALLEGED WRONG WAS NOT RELATED TO MARITIME SERVICE, NAVIGATION OR COMMERCE ON NAVIGABLE WATER.

The district court found two grounds for denying admiralty jurisdiction. The tort occurred on land and the wrong alleged was not related to any maritime service, navigation or commerce on navigable water; i.e., there was no maritime nexus. The court of appeals did not consider the second point because it found that the tort occurred on land and rested its decision on that point alone.

Should this Court conclude that the district court and court of appeals correctly decided the locus question, it need go no further though it might, if it wished to do so, go on to decide the maritime nexus question. On the other hand, if the Court finds that the tort here had a maritime locus it will then need to determine whether a maritime nexus is required for admiralty jurisdiction and, if so, whether the wrong in this case bears a relationship to some maritime service, navigation or commerce on navigable waters. We therefore turn to a discussion of those points.

**A. Admiralty Jurisdiction Is Dependent
Not Only on a Maritime Locus But
Also on a Maritime Nexus.**

Some courts have held that admiralty jurisdiction over torts is determined solely by the locus of the tort. If the tort occurred on navigable waters nothing more is required. Other courts (including the Sixth Circuit)⁴ have held that more than locality is required for a tort action to be cognizable in admiralty. There must also be some maritime nexus; i.e., there must be a relationship between the wrong and some maritime service, navigation or commerce on navigable waters.

The question whether a maritime nexus is necessary for admiralty jurisdiction has not been decided by this Court. In considering whether it should adopt the "locality alone" test or the "maritime nexus" rule the Court may find most helpful the thorough and scholarly analysis of that question by the American Law Institute in its *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, adopted and promulgated by the Institute and published in December 1969. In addition to a distinguished group of reporters and consultants, the advisory committee for the study included four United States Courts of Appeals judges—Judge Henry J. Friendly of the Second Circuit, Judge Albert B. Maris (Ret.) of the Third Circuit, Judge John Minor Wisdom of the Fifth Circuit and Judge Charles Merton Merrill of the Ninth Circuit.

The American Law Institute Study strongly recommended rejection of the "locality alone" test and urged

4. See note 3, *supra*. The Fifth Circuit has also held that a maritime nexus is necessary for admiralty jurisdiction in the recent case of *Peytavin v. Government Employees Insurance Company*, 453 F.2d 1121 (5th Cir. 1972).

adoption of the maritime nexus requirement as expressed in *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967). The Institute was not impressed by "language in the cases suggesting that admiralty jurisdiction over torts is dependent on locality alone," noting that "formulation of the rule, however, arose at a time when it was difficult to conceive of an occurrence on water other than in connection with a vessel." (ALI Study, p. 231.)

The Institute was quite critical of the decision of the Third Circuit in *Weinstein*, saying (*Ibid.*):

If a plane takes off from Boston's Logan Airport bound for Philadelphia, and crashes on takeoff, it makes little sense that the next of kin of the passengers killed should be left to their usual remedies, ordinarily in state court, if the plane crashes on land, but that they have access to a federal court, and the distinctive substantive law of admiralty applies, if the wrecked plane ends up in the waters of Boston Harbor. This result has been found to follow, however, from the rule that locality alone is enough to give jurisdiction in admiralty. *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963).

The Institute reviewed the existing state of authority on the "locality alone" test and reported (*Id.* at 231-2):

Despite the many cases saying that locality is enough for admiralty jurisdiction, this can hardly be regarded as settled. A district court, in holding that there was no admiralty jurisdiction when a swimmer at a public beach was injured by a submerged object on the bottom, said of the "locality alone" test that

this position has not been adopted either by the text writers or by the courts. The basis for admiralty jurisdiction must be a combination of a maritime wrong and a maritime location. A maritime wrong generally has been concluded to be one which in some way is involved with shipping or commerce.

McGuire v. City of New York, 192 F.Supp. 866, 868-869 (S.D.N.Y. 1961). See also *Smith v. Guerrant*, 290 F. Supp. 111 (S.D.Tex. 1968). Distinguished commentators have either thought the question an open one or have rejected the "locality alone" test. BENEDICT, ADMIRALTY § 127 (6th ed. 1940); CURRIE, FEDERAL COURTS: CASES AND MATERIALS 403-405 (1968); GILMORE & BLACK, THE LAW OF ADMIRALTY 22 (1957); Brown, *Jurisdiction of the Admiralty in Cases of Tort*, 9 COLUM.L.REV. 1, 8 (1909); Hough, *Admiralty Jurisdiction—Of Late Years*, 37 HARV.L.REV. 529, 532 (1924); Robinson, *Tort Jurisdiction in American Admiralty*, 84 U.P.A.L.REV. 716, 734 (1936); Black, *Admiralty, Jurisdiction: Critique and Suggestions*, 50 COLUM.L.REV. 259, 264 (1950); Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 COLUM.L.REV. 1084, 1091-1092 (1964).

Commenting on the position of this Court on the matter, the Institute observed (*Id.* at 232):

It cannot be said that the Supreme Court is committed to the "locality alone" test. The cases in which it has spoken of locality as determinative have been cases in which it was announcing a rule of exclusion. The locality test is a necessary condition of admiralty jurisdiction over torts, but the Court has not said that it is a sufficient condition. Indeed the Court expressly

left the matter open when it was last confronted with the question directly. It said that it need not decide whether locality alone is enough for jurisdiction, since:

If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters was quite sufficient.

Atlantic Transp. Co. v. Imbroke, 234 U.S. 52, 62 (1914).

The logic of the analysis of this matter by the Institute is unanswerable. This Court should hold that admiralty jurisdiction over torts is dependent not only on a maritime locus of the tort but that there must also exist a relationship between the wrong and some maritime service, navigation or commerce on navigable waters.

B. The Wrong Here Has No Relationship Whatsoever to Any Maritime Service, Navigation or Commerce on Navigable Waters.

In considering whether there is present in this case the requisite maritime nexus to confer admiralty jurisdiction on the district court, it is not sufficient to find some relationship between aviation generally and maritime affairs. It is thus wholly irrelevant that airplanes have in large measure supplanted ships in carrying passengers across the oceans of the world.

If a maritime nexus is to be required the test is whether the *wrong* has a relationship to maritime affairs. It is thus necessary to have in mind the nature of the "wrong" on which petitioners base their claims against respondents.

In paragraph 8 of their complaint, petitioners claim that respondents City of Cleveland and Schwenz were negligent in their operation, control, maintenance, supervision and inspection of the airport, in failing to remove the large flock of birds from the runway and in failing to warn petitioners' pilots of the existence of that hazard. (R. 3-4.) It is significant that this allegation relates exclusively to the operation, maintenance and control of an airport entirely on land although located adjacent to navigable waters. The "wrong" consists of the creation of a hazard *on land* and the failure of respondents to warn petitioners of that *land based* hazard.

It is too obvious to require further elaboration that the "wrong" in this case had no conceivable relationship to any maritime service, navigation or commerce on navigable waters.

**C. Admiralty Law Is Not Suited
for the Adjudication of Issues
Arising in Aviation Tort Cases.**

Petitioners argue that aircraft have become a major instrument of travel and commerce across the high seas and that planes have largely supplanted ships in carrying passengers over the oceans. (Brief of Petitioners, p. 60.) Petitioners claim, as did the dissenting judge below, that "there is some maritime character to any flight of any airplane over any navigable water." (*Id.* at 59.)

It is true that the majority of transoceanic passengers today travel by plane. But analysis will demonstrate that there is no more maritime character to a New York-London flight than there is to a New York-Los Angeles flight. Certainly there was no maritime character whatever to the flight on which petitioners' plane was bound

at the time of its crash—from Cleveland, Ohio to Bangor, Maine, more than 99.99% over land.

Admiralty law is a body of law that has grown up over many centuries for disposing of controversies arising out of the operation and navigation of vessels. See BENE-DICT, ADMIRALTY §§ 6-8, 734-737 (6th ed. 1940); GILMORE & BLACK, ADMIRALTY §§ 1-1 through 1-10 (1957). Maritime law grew up under the tutelage of the civil law. It is concerned with ships and vessels, maritime liens, the general average, captures and prizes, limitation of liability, maritime insurance, claims for salvage, seamen's remedies, maintenance and cure—matters which have no conceivable bearing on the operation of aircraft, whether over water or land.

If two vessels collide at sea or a ship founders off Cape Hatteras, admiralty law—as it has developed over years of maritime activity—is well suited to resolve questions of fault, liability, and all the essentially nautical questions that arise from such a catastrophe. But the same principles are wholly inapplicable to the determination of fault or liability when two planes collide or an aircraft crashes. That the crash occurs over water does not change that fact.

Litigation arising out of air crashes—whether on land or sea—is essentially concerned with the judicial determination of two issues; first, fault and resulting liability and second, the amount of recovery. Admiralty law can be of no assistance in the determination of either of those issues.

In an air crash case liability may be predicated on one or more of several claims. One of the common claims, of course, is pilot error. But the problems of flying and navigating a modern jet aircraft clearly have no more relationship to the operation and navigation of vessels

than they do to driving a car on the highways. It would make just as much sense to say that air crash cases in the State of Ohio should be governed by the Motor Vehicle Traffic Code of the State of Ohio (Ohio Rev. Code, Ch. 4511) simply because airplanes now carry passengers who formerly traveled by motor vehicle.

In many air crash cases claims are made that the manufacturer of the plane or one or more of its components was negligent in the design, manufacture or testing of the aircraft or component. There may be claims that the operator of the plane was negligent in the maintenance of the aircraft or one or more of its components. Surely it needs no extended exposition to demonstrate that the complex, technical questions presented by such claims are wholly unrelated to any possible aspect of admiralty law.

The third type of claim in air crash cases is that of error on the part of the airport operator, control tower or air traffic control. That is the basis for the claims asserted by petitioners in this case. Yet it is inconceivable that any aspect of admiralty law would be of assistance to the court in resolving such questions in the present case or in any other aircraft tort action.

A large body of regulations has been promulgated by the Federal Aviation Administration for the purpose of governing the operation of aircraft, the design, manufacture and testing of airplanes and their components (and approval thereof by the F.A.A.), the maintenance of planes and equipment and also the operation of airports and the control of air traffic. (Federal Aviation Regulations, 14 C.F.R. Chapter I.) Experience indicates that trial courts customarily utilize these regulations, to the extent applicable, in the trial of air crash cases in order to determine—or submit to a jury for determination—questions

concerning the operation of planes, their design, manufacture, testing and maintenance and the control of air traffic.

Surely it makes sense to apply to the adjudication of air crash cases—whether on land or sea—rules adopted and promulgated specifically for application to aircraft. It makes no sense whatever to say that the adjudication of such disputes should be governed by admiralty law—a body of law designed for application to ships and vessels.

So far as damages are concerned, there is no justification for applying maritime law. Damages arising from air crashes which result in personal injuries, death or property damage can and should be determined by the same rules of law applicable to other tort actions.

D. If a Uniform Law for Aviation Tort Cases Be Desirable, It Should Be Enacted by Congress, Not Imposed by Judicial Decree.

Petitioners contend that "application of federal general maritime law in admiralty cases insures uniformity of decisions and uniformity of results in multiparty cases, and eliminates complex choice of law problems." (Brief of Petitioners, p. 56.)

On the contrary, if petitioners prevail, rather than obtaining uniformity of decisions and results, the decision and result in an air crash case will be made to depend on the purely fortuitous circumstance whether the plane comes to rest on land or in navigable waters. As the American Law Institute Study put the matter (p. 231):

If a plane takes off from Boston's Logan Airport bound for Philadelphia, and crashes on takeoff, it makes little sense that the next of kin of the pas-

sengers killed should be left to their usual remedies, ordinarily in state court, if the plane crashes on land, but that they have access to a federal court, and the distinctive substantive law of admiralty applies, if the wrecked plane ends up in the waters of Boston Harbor.

It is significant to note that bills were introduced in the 91st Congress "to improve the judicial machinery by providing for federal jurisdiction and a body of uniform federal law for cases arising out of aviation and space activities." (S.961, H.R.8373, 91st Cong.) Similar legislation had been introduced in earlier sessions of the Congress. (S.3305, S.3306 and S.4089, 90th Cong.) To date no such legislation has been enacted by the Congress.

Opinions as to the desirability of such legislation are certainly not unanimous. One need only examine the record of Hearings on S.961 before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, 91st Congress, First Session, to recognize that there is a wide divergence of views on the necessity for and desirability of a uniform federal law governing aircraft crash litigation. One of the witnesses at the hearings summed up the reaction of the bar to the bill quite accurately. After mentioning a number of meetings of legal groups and committee deliberations in which S.961 had been discussed, he said (S.961 Hearings, p. 253):

At all of these meetings and in all of these committee deliberations the only ones to support the Bill, aside from its sponsor, Senator Tydings, were Judge Hall and Mr. Dreyfuss. To my knowledge, not one experienced trial lawyer active in this field, for plaintiff or defendant, favors it.

Simply expressed, the opposition to the Bill results from the fact that *there is no manifest need for it*. The present judicial machinery, both state and Federal, functions well in handling the problem. The Bill would constitute the first major incursion into the traditional application of state law, and jurisdiction of state courts, into the field of torts. Other Federal statutes such as the Jones Act, the Federal Employers Liability Act, and the Death on the High Seas Act, were enacted to fill a void—to supply a Federal remedy where no state remedy existed. *Here there is adequate state law and there are adequate state remedies*, and the Bill would cut down state jurisdiction and the application of state law.

If, however, a uniform federal law applicable to aviation tort cases is desirable, such a law should be enacted by Congress, not imposed by judicial decree.

Certainly the scheme proposed by petitioners is not acceptable. They would achieve so-called uniformity by applying maritime law (a body of law unsuited to aircraft crash litigation), not uniformly to all air crashes in the United States, but only to those in which the aircraft comes to rest in navigable waters. Nothing is less likely to produce uniform results.

We urge the court to reject this ill-considered proposal—a proposal which has no merit and no reason other than producing the result petitioners desire in this case.

CONCLUSION

The court of appeals correctly held that "the alleged tort occurred on land, even though the plane fell into navigable waters shortly after take off from the airport, and that no right of action is cognizable in admiralty." (Pet. for Cert. 1a.) That decision accords with settled law pronounced by this Court.

There is no justification for applying admiralty law to this case. Admiralty law is neither relevant nor suited to the adjudication of legal issues arising in aircraft tort litigation.

The judgment of the court of appeals should be affirmed.

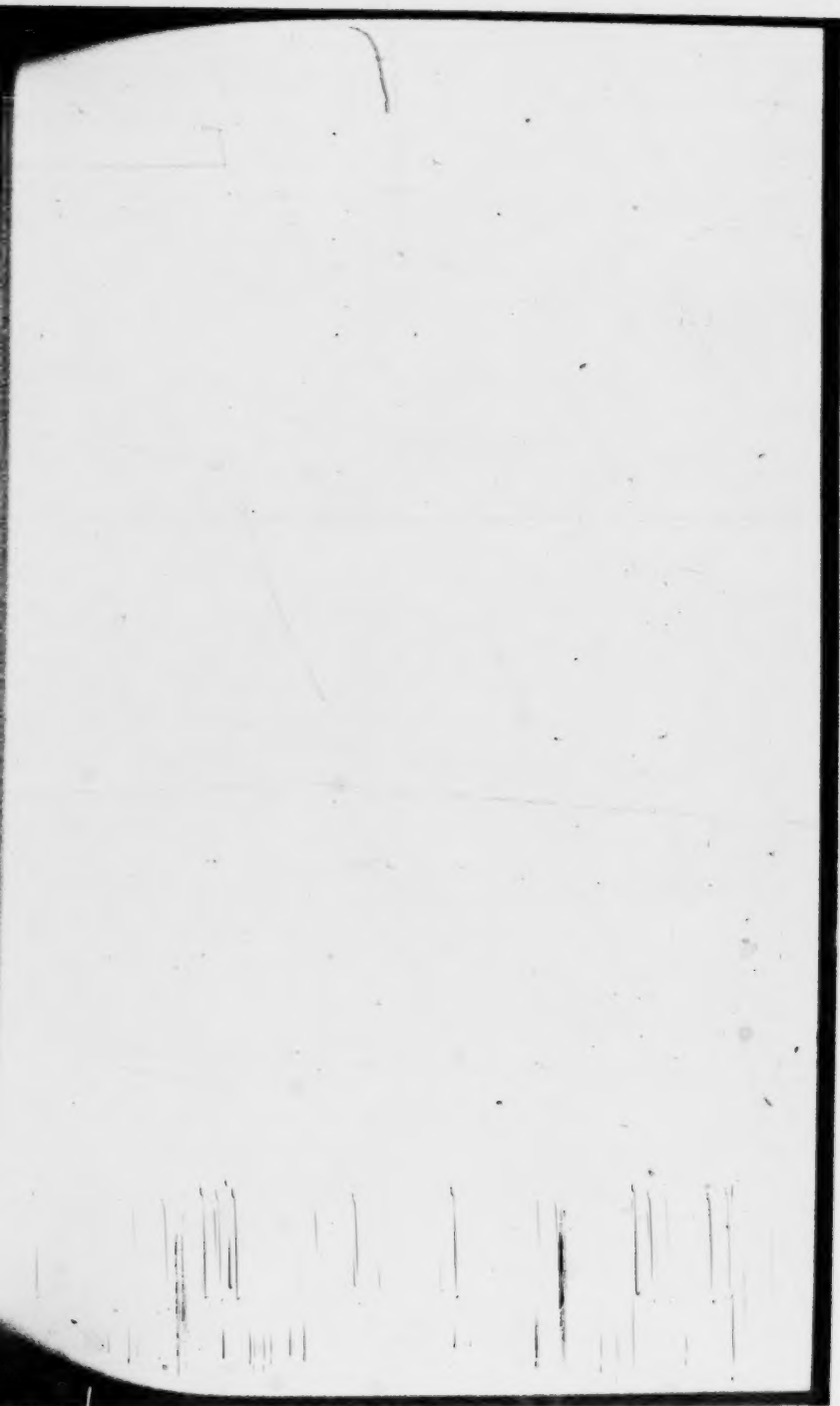
Respectfully submitted,

EDWARD D. CROCKER

ARTER & HADDEN

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Cleveland, Ohio and Phillip A.
Schwenz*

July 1, 1972



In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-678

**EXECUTIVE JET AVIATION, INC.,
ET AL., PETITIONERS**

v.

CITY OF CLEVELAND, OHIO, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**MEMORANDUM FOR THE RESPONDENT HOWARD E. DICKEN
IN OPPOSITION**

This action arises out of the crash of petitioners' aircraft during take-off from a runway at Burke Lakefront Airport in Cleveland, Ohio, adjacent to Lake Erie (R. 18).¹ After receiving clearance for take-off and a warning that numerous seagulls were on the runway, the aircraft executed its take-off and became airborne about midway down the runway (R. 18-19, 70-72, Ph. 2). The take-off flushed the seagulls on the runway

¹ "R." references are to the Appendix, and "Ph." references are to the Appendix of Photographic Exhibits, both of which were filed in the court of appeals and transmitted to this Court.

and they rose into the airspace above the runway and directly in front of the approaching airborne aircraft (App. 19, 70-72). The aircraft, by this time flying approximately 100 feet above the runway, collided with a large number of seagulls, many hitting its engine intakes and belly (App. 19, 59-60, 70-72).

As a result of the impact, there was an almost immediate total loss of the aircraft's power and a substantial reduction in its air speed (App. 19). Settling back down to the runway, the aircraft veered slightly to the left, struck a portion of the airport perimeter fence and the top of a pickup truck parked adjacent to the fence, and came to rest in Lake Erie, a short distance off shore (App. 19, 39-53, 70-72). While there were no injuries to the crew, (App. 20) the aircraft sank and became a total loss.

Invoking admiralty jurisdiction, petitioners brought this action, against the City of Cleveland, Ohio, as the owner and operator of Burke Lakefront Airport, Philip A. Schwenz, the airport manager, and Howard E. Dicken, a Federal Aviation Administration (FAA) air traffic controller on duty at the airport at the time of the crash, for the value of its aircraft (App. 3-4). The district court held that the case was not cognizable in admiralty and dismissed the complaint for lack of jurisdiction over the subject matter (Pet. App. 27a-42a). A divided court of appeals affirmed on the ground that "the alleged tort . . . occurred on land before the aircraft reached Lake Erie" (Pet. App. 6a).

1. It has long been established that only torts occurring on navigable waters are within admiralty jurisdiction. *Victory Carriers, Inc. v. Law* (No. 70-54, October

Term 1971), 40 U.S.L.W. 4059, 4060-61. This Court has held that the locus of the tort is where the allegedly negligent act occurred and took effect, and not where the injuries or damages are sustained. If "[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land", then admiralty has no jurisdiction. *Smith & Son v. Taylor*, 276 U.S. 179, 182. See, also, *Minnie v. Port Huron Co.*, 295 U.S. 647, 649; *The Admiral Peoples*, 295 U.S. 649.

Both courts below correctly held that admiralty jurisdiction does not lie here because the allegedly tortious conduct—the failure of the federal air traffic controller to warn petitioners' aircraft of the seagulls on the runway and the failure of the City of Cleveland and its airport manager to remove those seagulls from the runway—and the consummation of the alleged tort—the resultant collision of petitioners' aircraft with the seagulls—occurred on land over the runway. Further review of this factual determination is not warranted.*

2. Contrary to petitioners' assertion (Pet. 10-16), the decision below is not inconsistent with *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (C.A. 3), certiorari denied, 375 U.S. 940. The decision in that case, sustaining admiralty jurisdiction over the crash of an aircraft into the navigable waters of Boston Harbor, was rendered on a motion to dismiss the complaint, and there is nothing in either the district court's opinion

* Petitioners have also filed an action against the United States under the Federal Tort Claims Act, *Executive Jet Aviation, Inc. and Executive Jet Sales, Inc. v. United States* (N.D. Ohio, E. Div., Civ. No. C69-352), which has been held in abeyance pending the outcome of the instant case.

on the motion to dismiss (203 F.Supp. 430) or the opinion of the court of appeals to indicate that the facts before the court showed whether the aircraft first became inoperative over land or sea.³ Here, by contrast, the facts alleged by the petitioners show that the alleged tort occurred over land.⁴

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

January 1972.

³ To support their assertion, petitioners rely upon *Scott v. Eastern Air Lines, Inc.*, 339 F.2d 14 (C.A. 3), certiorari denied, 393 U.S. 979. In that case, the evidence at trial showed that birds had struck the aircraft over land before its crash into the harbor (see the district court opinion rendered after trial, *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673, 675 (E.D. Pa.)).

⁴ Since the instant case turns on undisputed facts showing that the alleged tort had its impact upon petitioners' aircraft over land, there was no need for the court below to reach the question of whether, in addition to a maritime location, there must be a maritime nexus to support admiralty jurisdiction.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-678

EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners*

v.

CITY OF CLEVELAND, OHIO, ET AL., *Respondents*

REPLY BRIEF FOR PETITIONERS

Petitioners Executive Jet Aviation, Inc. and Executive Jet Sales, Inc.¹ submit the following in reply to the arguments made and the authorities cited in the Briefs of respondents City of Cleveland, Ohio, and Phillip A. Schwenz,² and respondent Howard E. Dicken.³

¹ Hereinafter petitioners will be referred to collectively as "EJA."

² Hereinafter referred to collectively as "the City."

³ Hereinafter referred to as Dicken.

I. RESPONDENTS' EFFORTS TO RECONCILE THE SIXTH CIRCUIT'S DECISION IN THIS CASE WITH THE THIRD CIRCUIT'S CONFLICTING DECISION IN WEINSTEIN ARE UNAVALING

Briefly stated, respondents' position is that certiorari should be denied in this case because there is no conflict between the Sixth Circuit's decision herein and the decision of the Third Circuit in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963). They argue that the question involved in the two cases—the situs of the tort—is a factual one and that the facts in this case are “diametrically opposite”⁴ to the facts which were before the Third Circuit in *Weinstein*. Therefore, they argue, “Further review of this factual determination is not warranted.”⁵ In support of these arguments the City cites selected passages from the Record in the *Weinstein* case on file in the Third Circuit.

The question involved in this case is legal, not factual. It was succinctly stated by Circuit Judge Edwards in his dissenting opinion as follows:

Do the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash is alleged to be tortious conduct which occurred on land? (App. A, p. 8a)

That statement should be compared with the “Statement of Question Involved” presented to the Third Circuit by the appellants in the *Weinstein* case:

Where an airplane crashes into maritime waters, does it not give rise to a maritime tort, so that

⁴ Brief for Respondents The City at 5.

⁵ Brief for Respondent Dicken at 3.

a federal court sitting in admiralty, has jurisdiction to determine the action?⁶

No one could seriously argue that the facts of this crash are "diametrically opposite" to the facts of the Boston Harbor crash which gave rise to the *Weinstein* litigation. In both instances land-based aircraft took off from airports located near navigable water; both aircraft met a flight of birds while still over the runway; both ingested birds into their jet engines; many dead birds were found on both runways; and in both cases the ingestion of the birds over land caused the jet engines to flameout and the aircraft to descend and crash into nearby navigable water. Compare the statement of the pilots in this case⁷ with the facts of the Boston Harbor crash as reported in *Rapp v. Eastern Air Lines, Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967).

Respondents do argue, however, that the Third Circuit was apparently unaware of the fact that the cause of the Boston Harbor crash was bird ingestion into the engines on takeoff. And they imply that had the Third Circuit known of this fact *Weinstein* would have gone the other way under the authority of the "controlling" workmen's compensation cases cited by them. It is only necessary to look at those portions of the *Weinstein* record on file in the Third Circuit which were not cited to this Court by respondents to see how specious this argument is.

⁶ Consolidated Brief and Appendix for Appellants in *Weinstein v. Eastern Airlines, Inc.*, United States Court of Appeals for the Third Circuit, Nos. 14023-14029, at 1. Hereinafter cited as "Brief for Appellants—*Weinstein*."

⁷ Petitioners' Brief for Certiorari at 4-6.

The libel which was before the Third Circuit in Weinstein read as follows:

8. On or about October 4, 1960, libellant's decedent was a passenger for hire in a certain Lockheed Electra Airplane N5533, owned, operated, possessed and controlled by Eastern Airlines, Inc., as a common carrier on a regularly scheduled flight to Philadelphia and points south, designated as Flight No. 375, which had departed from the Logan International Airport in Massachusetts at approximately 4 p.m.

9. Shortly after the said aircraft had become airborne, following takeoff from the said airport, *by reason of the negligence of the respondents, and each of them, and by virtue of their respective breaches of warranties said aircraft crashed into the navigable waters of Boston Harbor, causing libellant's decedent to suffer severe and disabling injuries resulting in his death.*

10. The respondent United States of America, through its various agencies including the Civil Aeronautics Administration, Civil Aeronautics Board and Federal Aviation Agency, through their respective agents, servants, workmen and employees, was careless and negligent under the circumstances, and by reason thereof proximately caused the injuries and death of the libellant's decedent, under the circumstances, in and by:

* * *

(f) failing to take prompt, proper and adequate measures to meet the problem of bird ingestion by planes using said airport and to re-

quire proper and adequate measures to be taken to protect against said hazard;

(g) failing to exercise proper and adequate control over take-off of the aforesaid aircraft;

* * *

15. The aforesaid crash and resulting injury and death of the libellant's decedent were caused by the carelessness and negligence of the respondent Lockheed Aircraft Corporation by its agents, servants, workmen and employees, under the circumstances in:

* * *

(c) failing to properly and adequately test the power plants, the various component parts, control devices and instrumentations thereof incorporated into said aircraft for bird ingestion;

(d) failing to properly and adequately design, equip, test, alter, repair and replace air intakes, instrumentation and controls over power plants of said aircraft to permit safe take-off under circumstances where birds might be encountered.

* * *

17. Solely by reason of the carelessness and negligence of the respective respondents, as aforesaid, and the breach of warranties by each of them, as set forth hereinabove, *libellant's decedent was caused to suffer painful and severe injuries and to wage an unsuccessful struggle for survival, as a consequence of which he succumbed to his injuries and/or the elements, including the waters of the harbor in which the plane had crashed, and died therefrom.*

* * *

24. All and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

(Brief for Appellants—*Weinstein* at 5a-14a emphasis added.)

It can thus be seen that in *Weinstein*, as here, the court of appeals was faced with a complaint which alleged that land-based negligence, consisting among other things of a failure to take the precautions necessary to prevent the hazard of bird ingestion by planes during takeoff and to control adequately the aircraft's takeoff, caused injuries and death in the navigable waters into which the plane crashed.

Faced with that question the Third Circuit said, "If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required." 316 F.2d at 761. It then concluded:

We hold, therefore, that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty. (316 F.2d 766)

Under respondents' view of the law as urged in this case the Third Circuit, *on the record before it in Weinstein*, would have had to conclude that the negligence there alleged—the failure of the defendants to prevent hazards to aircraft from bird ingestion—became operative *when the birds were ingested into the aircraft's engines over land*; and that the situs of the tort was therefore over land. In actual fact, the Third Circuit correctly followed the applicable law as announced by this Court in *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865),

and *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914), and found that the tort was a maritime one. EJA submits that the conclusion reached by Judge Edwards in his dissenting opinion in this case is inescapable. He said, "I believe that the facts of this case require us to accept or reject *Weinstein*, *supra*, and thus to decide for this Circuit whether air ships, which are increasingly displacing water-borne ships in maritime commerce, are within the maritime jurisdiction *when they crash on navigable waters*." (App. A, p. 11a, emphasis added.)

In truth, there is no valid way to reconcile the decision in this case with the *Weinstein* holding. The conflict is direct and irreconcilable. Certiorari should be granted to resolve it and to bring about uniformity of decisions among the federal courts of appeal on this important matter of federal law.

II. THE DECISIONS OF THIS COURT APPLICABLE TO THIS CASE ARE THE PLYMOUTH AND ATLANTIC TRANSPORT CO. v. IMBROVEK, NOT THE WORKMEN'S COMPENSATION CASES RELIED UPON BY RESPONDENTS

Respondents contend that this case is controlled by three cases from this Court: *Smith & Son v. Taylor*, 276 U.S. 179 (1928); *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); and *The Admiral Peoples*, 295 U.S. 649 (1935). The test, they say, was correctly stated by Circuit Judge McCree in his concurring opinion written in this case. Judge McCree said:

The rule, as I understand it, is that the situs of the tort is where the negligence becomes operative, *not where the damages, or the major portion of them, are sustained*. (App. A, p. 7a, emphasis added.)

EJA submits that the workmen's compensation cases relied upon by respondents are inapplicable here, and

that the above statement of the "locality test" is incorrect.

In *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865), negligence committed on board a ship tied up to a wharf in Chicago caused a fire on board ship which spread to the wharf and surrounding buildings. A libel was filed against the owners of the vessel to recover for the damage done to the wharf and buildings. This Court held that the tort involved was not a maritime one and the case not cognizable in admiralty. It said:

It will be observed, that the *entire damage complained of* by the libelants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the *wrong* was on the water, but the substance and consummation of the *injury* on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over maritime torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; . . .

* * *

They [maritime torts] are cases of personal wrongs, which commenced on the land; such as improperly enticing a minor on board a ship and there exercising unlawful authority over him. The substance and consummation of the wrong were on board the vessel—on the high seas, or navigable waters—and the *injury complete within admiralty cognizance*. It was the tortious acts on board the vessel to which the jurisdiction attached.

This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely: that the *wrong and injury* complained of must have been committed *wholly* upon the high seas of navigable

waters, or, at least, the substance and consummation of *the same* must have taken place upon these waters to be within the admiralty jurisdiction. In other words, the *cause of damage*, in technical language, whatever else attended it, *must have there complete.*

* * *

... The answer is, as already given; the *whole*, or at least the *substantial* cause of action, arising out of the wrong, must be *complete within the locality upon which the jurisdiction depends*—on the high seas or navigable waters. (70 U.S. at 33-36, emphasis added.)

Thus, it was made clear by this Court in 1865 that the locality rule required that the "injury complained of" be committed *wholly* within the locality upon which the jurisdiction depends. This requirement was referred to again in 1914 in *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914), when this Court said, "As the *injury* occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met." 324 U.S. at 58, emphasis added. And just a few weeks ago this Court said in *Victory Carriers, Inc. v. Law*, — U.S. — (No. 70-54, October Term, December 13, 1971):

The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the *locality of the accident* and that maritime law governs only those torts occurring on navigable waters of the United States. (40 U.S.L.W. 4059, 4060; emphasis added.)

The "locality of the accident" in this case is where the aircraft crashed—in the navigable waters of Lake Erie. The "injury complained of" in this case is the total destruction of EJA's plane caused by ditching it

in Lake Erie where it remained submerged in 40 to 45 feet of water for more than two days. The bending done to the fuselage during the ditching, the intensive water soaking given to all electrical components, radios and instruments, and the damage done during salvaging and raising made the aircraft a total loss. (R. 49, 50, 54, 60, 61). EJA's claim is for that total loss; for damages for the loss of use of the aircraft during the period reasonably required to obtain a replacement aircraft; and for salvage, raising and other costs incurred. *This is not a claim for the cost of overhauling two jet engines because of bird ingestion*, which could have been the extent of the damage to EJA's aircraft had this incident occurred on a long runway at an airport surrounded by land rather than on a short runway ending in navigable water. Respondents are fond of referring to EJA's aircraft "coming to rest in navigable waters."⁸ The actual facts were more accurately stated by Judge Edwards in his dissenting opinion when he said, "This record makes clear that the impact on the water and the sinking of the plane with its consequent water damage accomplished *the destruction complained of.*" (App. A, p. 25a, n. 4; emphasis added.)

In view of these facts and allegations, and in view of the locality rule as stated in *The Plymouth, supra*, and *Atlantic Transport Co. v. Imbrovek, supra*, EJA submits that the court of appeals was in error when it held that the locality of the tort in this case was over land. The reason given, and the argument urged upon this Court by respondents, is that the previously cited workmen's compensation cases control this case.

⁸ Brief for Respondents The City at 1.

Respondents rely heavily on the case of *Smith & Son v. Taylor, supra*, to support their contention that it was the initial ingestion of the birds into the jet engines while the aircraft was over land that "gave rise to the cause of action" in this case. 276 U.S. at 182. How important is *Smith & Son v. Taylor* as a precedent in 1972, and what are the reasons why the language in that 1928 workmen's compensation case should be applied in future cases where aircraft have crashed in navigable waters?

Respondents would have this Court believe that the solution here is a simple one—the automatic application of the language in *Smith & Son* to the facts of this case. But as Mr. Justice Holmes noted in *The Blackheath*, 195 U.S. 361 (1904), "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." To put *Smith & Son* in its proper perspective, one must review the rather inaccurate history surrounding the maritime workmen's compensation cases. That history has been spelled out in detail by this Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962); *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); and *Victory Carriers, Inc. v. Law, supra*. Suffice it to say here, after this Court's decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), "many thousands of employees" were deprived of the benefits of workmen's compensation. *Calbeck v. Travelers Insurance Co., supra*, at 118. Two attempts by Congress to deal with the situation by legislation were unsuccessful. In 1927, faced with the fact that "for many maritime injuries no compensation remedy was available," Congress "turned to a uniform federal compensation law." 370 U.S. at 120. In that year Congress passed the Long-

shoremen's and Harbor Workers' Compensation Act.⁹ As Judge Edwards observed in his dissenting opinion in this case:

Smith & Sons . . . preceded the effective date of federal Longshoremen's Compensation Act and upheld a state compensation award. The holding of the court was to deny that "the case is *exclusively* within admiralty jurisdiction," as appellants therein were claiming. (App. A, p. 15a.)

Today it is extremely doubtful that a case like *Smith & Son* would be brought, as it was in 1928, in a state court under a state Workmen's Compensation Law. It would probably not even be brought under the federal Longshoremen's Compensation Act, but be filed instead in admiralty, against the owner of the vessel claiming unlimited damages caused by the unseaworthiness of the ship.¹⁰ Because of the Admiralty Extension Act¹¹ passed by Congress in 1948, the claim would undoubtedly be cognizable in admiralty today. See *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963); *Victory Carriers, Inc. v. Law, supra*.

Circuit Judge John R. Brown put *Smith & Son* and respondents' other cases in their proper perspective in *Pure Oil Company v. Snipes*, 293 F. 2d 60 (5th Cir. 1961), a case involving an oil driller who was injured

⁹ 33 U.S.C. §§ 901-950 (1927).

¹⁰ In *Victory Carriers, Inc. v. Law, supra*, such a claim was filed by a longshoreman and this Court said:

. . . What is at issue is the *amount* of the recovery not against a shipowner, but against the stevedore employer. As this case illustrates, the shipowner's liability for unseaworthiness would merely be shifted, with attendant transaction costs, to the stevedore by way of a third party action for indemnity.

¹¹ 46 U.S.C. § 740 (1948).

while working on a fixed drilling platform in the Gulf of Mexico. The worker in that case fell from a tank on top of the platform, struck the platform deck 15 feet below, dropped through a hole in the platform into the ocean 50 feet below, striking at least two more steel structure members on the way down. The Fifth Circuit discussed *Smith & Son, supra*, *Minnie v. Port Huron Terminal Co., supra* and *The Admiral Peoples, supra*. It then said:

... Many of these refined distinctions are now of historic and academic interest only since Congress cut through many of them by the 1948 Act which extends admiralty and maritime jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C.A. § 740. (293 F. 2d at p. 65)

If the refined distinctions of respondents' workmen's compensation cases are "now of historic and academic interest only," why should they be injected into an area which has heretofore been free from "litigation-spawning confusion" because it is "easily susceptible of more workable solutions"? *Moragne v. States Marine Lines*, 398 U.S. 375, 40 (1970). Respondents have not cited a *single* case to this Court wherein the "refined distinctions" of *Smith & Son* and respondents' other cases have been applied to determine where an aircraft crashing into navigable waters "first became crippled." That is because there are no such cases. As the court said in *Thomson v. Chesapeake Yacht Club, Inc.*, 255 F. Supp. 555, 558 (D. Md. 1965), "The aircraft cases present special problems . . . and the decisions adopt a practical approach." That approach has been, *without exception*, to look at the "locality of

the accident," or crash, which is the "historic view of this Court" insofar as maritime tort jurisdiction is concerned. *Victory Carriers, Inc. v. Law, supra*. Respondents have advanced no reasons why in aircraft cases this locality of the crash should be complicated by the "refined distinctions" found in *Smith & Son*. There are, on the other hand, extremely good reasons for *not* doing so. As aviation and space technology becomes more sophisticated in the future, supersonic transports and space shuttles will cross coastlines at altitudes many miles above the surface of the earth while traveling at thousands of miles per hour. If such a vehicle crashes in navigable waters, how is a court to determine whether it "first became crippled" over land or sea? In all aviation cases to date the locality of the crash has been the rule, and if the crash occurred on navigable waters the tort was a maritime one; nothing more was required. That has admittedly occurred in this case and the Sixth Circuit's finding that the tort here is a non-maritime one stands alone against all previously-reported aircraft cases.

III. RESPONDENTS' CONTENTION THAT THE FEDERAL AVIATION ACT PRECLUDES THE EXERCISE OF ADMIRALTY JURISDICTION AS TO AIRCRAFT CRASHES IN NAVIGABLE WATERS IS ERRONEOUS

The City argues that EJA's contention that the federal general maritime law is applicable in cases such as this of aircraft crashes in navigable waters "squarely conflicts with the express policy of Congress that the federal interest lies in the orderly and uniform regulation of *all* air commerce under the Federal Aviation Act of 1958 (49 U.S.C. §§ 1301-1542)" ¹²

¹² Brief for Respondent The City at 13.

This identical argument was made to the Third Circuit by the respondents in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963), and it was correctly rejected in toto by that court as erroneous. The Third Circuit said:

The respondents argue that the Federal Aviation Act of 1958, 49 U.S.C.A. § 1301 et seq. (1962 Supp.), precludes the exercise of admiralty jurisdiction as to aircraft crashes in navigable waters. 49 U.S.C.A. § 1509(a) provides in pertinent part that "[T]he navigation and shipping laws of the United States * * * shall not be construed to apply to seaplanes or other aircraft * * *." The brief correct answer to this contention is that the Federal Aviation Act is not a statute intended either to create or to limit judicial jurisdiction. "The principal purpose of this legislation is to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations." 1958 Cong. & Admin. News, p. 3741. In *Wilson v. Transocean Airlines*, 121 F.Supp. 85, 93 (N.D. Calif. 1954), the argument herein urged by the respondents was raised and rejected, the court stating "The term 'navigation and shipping laws' * * * obviously refers to those federal laws specifically governing the navigation and operation of the merchant marine. The term was never intended to include a general admiralty statute * * *." With reference to the predecessor to the 1958 Act, the Air Commerce Act of 1926, 44 Stat. 568, which contained the same language as the pertinent section in the Federal Aviation Act of 1958, Benedict states: "It will be noted that the Act does not go so far as to deny the existence of admiralty and maritime jurisdiction generally over aircraft * * *." 1 Benedict, Admiralty § 58, at pp. 118-119 (6th ed.). See also *Choy v. Pan American Airways*, 1941 A.M.C. 483, 485 (S.D.N.Y.). (316 F.2d at 765, 766.)

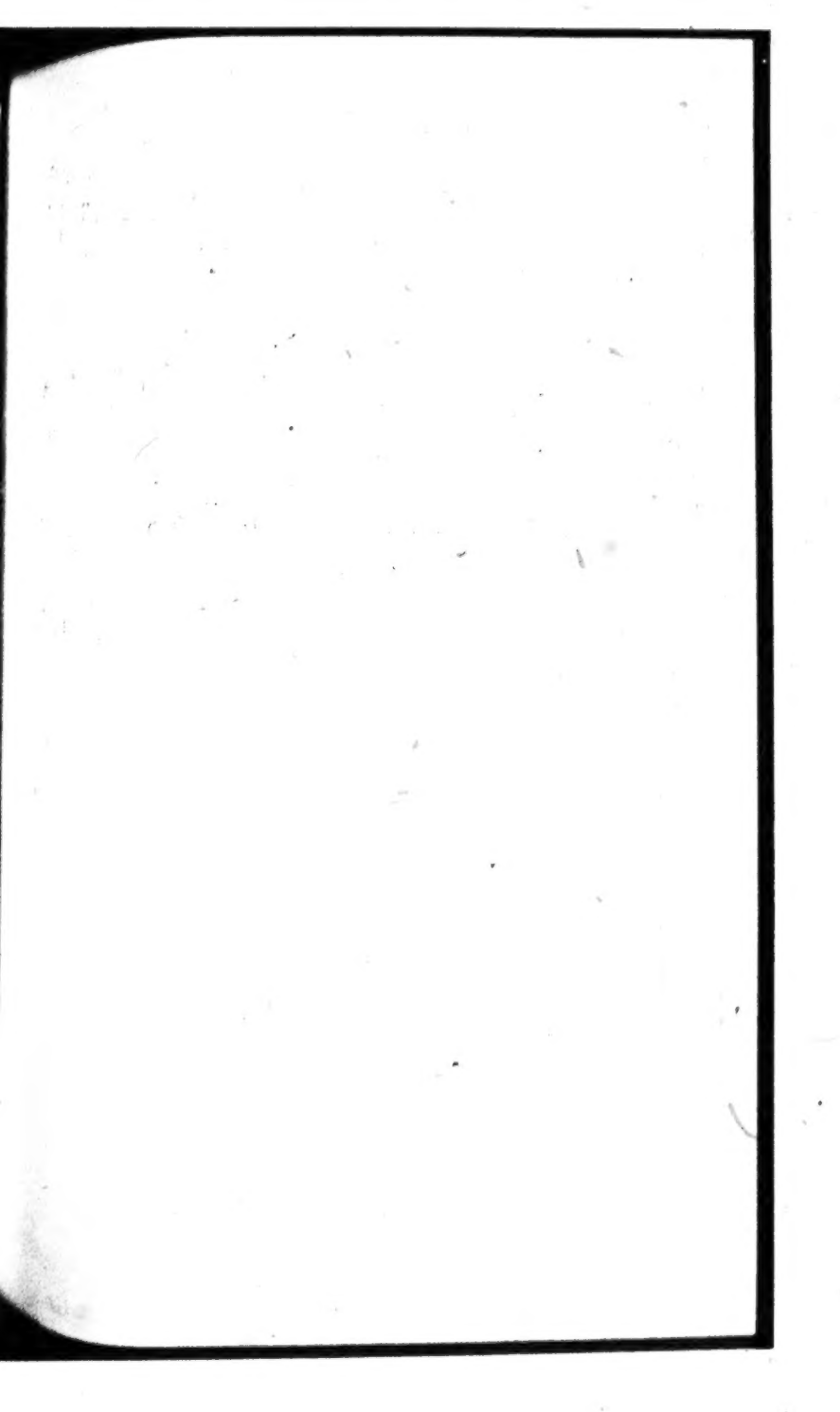
CONCLUSION

By reason of all the authority and arguments in EJA's Petition for a Writ of Certiorari and in this Reply Brief, EJA submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

January 21, 1972



IN THE
Supreme Court of the United States
October Term, 1972

No. 71-678

Supreme Court, U. S.
FILED

MAY 1 1972

WILLIAM H. REAGAN, JR.

THE JET AVIATION, INC., ET AL., Petitioners,

v.

THE CLEVELAND, OHIO, ET AL., Respondents.

and Certified to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE PETITIONERS

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1972

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-678

EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners*,

v.

CITY OF CLEVELAND, OHIO, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. for Cert., App. A, pp. 1a-26a) is reported at 448 F.2d 151. The opinion of the district court (Pet. for Cert., App. B, pp. 27a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered August 24, 1971. The petition for a writ of certiorari was filed November 19, 1971, and was granted February 22, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Do the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash is alleged to be tortious conduct which occurred on land?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONST. art. III:

§ 2. *Jurisdiction of Courts*

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . .

United States Code (U.S.C.), Title 28:

§ 1333. *Admiralty, maritime and prize cases*

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction. . . .

STATEMENT OF THE CASE

On July 28, 1968, a corporate jet aircraft known as a Falcon Mystere M-20, Registration N367EJ (hereinafter referred to as the Falcon), owned by petitioner Executive Jet Sales, Inc. and operated by petitioner Executive Jet Aviation, Inc.¹ crashed in the navigable

¹ Hereinafter petitioners will be referred to collectively as "EJA."

waters of Lake Erie after striking several hundred seagulls shortly after takeoff from Burke Lakefront Airport at Cleveland, Ohio (hereinafter referred to as the airport). The airport is owned, operated and maintained by respondent the City of Cleveland, Ohio, and at the time of the crash respondent Phillip A. Schwenz² was employed by the City as manager of the airport and was acting in the scope and course of his employment (A. 2, 3, 7, 8). Respondent Howard E. Dicken was employed by the United States Federal Aviation Administration (FAA) at the time of the crash and was acting in the scope of his employment as an Air Traffic Controller when he issued a clearance from the airport tower to the Falcon for takeoff (A. 3, 5).

What happened at the time of this crash is succinctly stated by the two pilots flying the Falcon in a statement given by them two days after the accident to the National Transportation Safety Board during the course of the official investigation of this accident (A. 13-15). That statement reads:

STATEMENT OF WITNESS

July 30, 1968

Pilot Statement: W. P. Flower, P/C

C. Dirck, C/P

The Aircraft—EJ 367—arrived at Burke Lakefront July 26 approximately 1600 hours. It was immediately refueled by Remmert-Warner, secured and the crew departed to the motel. The crew consisted of W. P. Flower, P/C, C. Dirck, C/P, and Miss J. Vargo, Hostess.

² Hereinafter respondents, the City of Cleveland, Ohio, and Phillip A. Schwenz will be referred to collectively as "the City."

On the 28th at approximately 1000 hours, the crew arrived at Lakefront for a ferry flight to Portland, Maine, picking up passengers and continuing to White Plains, N. Y. The aircraft was uncovered and preflighted by the First officer. The Hostess made a final inspection of the cabin in preparation for picking up passengers and the Captain obtained the weather, filed a flight plan, and obtained a release from the Company dispatcher. After engine start we received clearance to taxi to Runway 6 Left. As the flight was non-revenue it is company policy for the first officer to fly in the left seat for proficiency and training. The first officer was flying from the left seat, the captain in the right seat, and the Hostess was seated in the first seat on the right side facing aft.

The check list was completed and on taxiing out, it was noted that one aircraft was on landing rollout on 6 Left, and ground advised an aircraft was on the approach to 6 Right. The ground advised to expedite across 6 Right. At this point there were, to my knowledge, no advisories regarding birds from ground control. In obtaining the weather by phone for Cleveland, Portland, and White Plains, there was no information given regarding birds as would appear on the end of the Cleveland sequence. On instructions, the pilot in the right seat, switched to tower frequency, and requested take-off. The take-off clearance initially was faded with the final portion of the statement saying something to the effect "Caution, birds *on end of runway.*" These exact remarks can be substantiated by the tower tape. The bird caution to me was a routine advisory as would be given for a few or small number of birds. The transmission did not possess extreme hazard information. As the take-off clearance was not clear a second request was made and a second clearance was issued for take-off. Neither pilot could see

the birds on the end of the runway. After clearance to take-off was received the pilot in the left seat executed the take-off and rotated at approximately 125 Kts. The pilot in the right seat made a power check, voiced 30 Kts., 100 Kts., V_1 and rotate. The pilot in the left seat could not distinguish the bird line prior to rotation and in his estimation could not abort the take-off. On rotating a sea of birds on the runway became visible. Approaching the birds at approximately 75 feet caused them to flush and fly into the aircraft, apparently hundreds hitting the belly and engine intakes. Bird impact substantially reduced the air speed an estimated 15 or 20 Kts. The pilot in the left seat raised the gear handle, the pilot in the right seat maneuvered the throttles in an effort to obtain partial power. There was almost immediate total loss of power. The engine temperature indicated above 850 degrees on both engines and the RPM dropped rapidly below 70%. The aircraft flew in a semi-stalled attitude stall horn blowing until contacting the water. The aircraft struck the top of a pick-up truck and a portion of the airport perimeter fence. The aircraft contacted the water in a flat attitude and on a second impact water entered the cabin almost immediately. Only a few seconds passed between bird impact and water contact and it is estimated that the aircraft did not attain more than 75 to 100 feet in altitude. After the second impact the pilot went to the rear of the aircraft to release the emergency exit and see if the stewardess was uninjured. The airplane settling in the water apparently exerted some pressure inside and it was impossible to open the right cabin emergency exit. One pilot succeeded in opening the pilot's left window with the fire extinguisher. The other pilot opened the left cabin exit. A small private boat picked up the crew as the aircraft was settling in the water. Approximately the nose cone area remained above the water level. The crew returned

to the airport and there were no injuries. The aircraft floated approximately 5 to 10 minutes. No bird dispersing method or system of any kind exists at the airport.

In conclusion, the advisory comment "birds on end of runway", "bird activity" is a caution remark and denoted no extreme hazard to the crew. It has been given routinely to hundreds of departing pilots at Lakefront. The mass of birds that must have been on the runway that would allow an aircraft to strike 314 birds to me denotes an extreme hazard. When an aircraft is cleared to takeoff, the pilot has every right to assume that there are no other aircraft on the runway, that there are no people on that runway or that there are not one thousand birds on the runway. In my estimation the runway should have been closed for departing jet traffic. With that many birds, the runway could never have been considered safe. It would have been helpful if some official survival assistance could have been available from the airport. The Coast Guard apparently does not have direct contact with the tower and it was sometime before they arrived at the submerged aircraft.

/s/ W. P. FLOWER
W. P. Flower

/s/ CHARLES E. DIRCK
C. Dirck

Official accident investigators later counted 314 dead seagulls on the runway (A. 19). They also determined that the aircraft impacted the water at a point located one-fifth of a statute mile from the cyclone fence which marked the airport boundary (A. 21, 22). The waters of Lake Erie are navigable at that point, their depth being estimated at "between 40 and 45 feet" (A. 23). The Falcon sank completely and remained submerged

in Lake Erie for more than two days (A. 23, 25). After it was raised an inspection of the aircraft revealed that, among other things, "the fuselage contained severe bending" (A. 27), and the interior of the aircraft (including all electrical components, radios and instruments) "revealed intensive water soaking" (A. 28).³

This action was brought within the admiralty and maritime jurisdiction of the United States District Court for the Northern District of Ohio, Eastern Division, by EJA against the City and respondent Dicken⁴ to recover for the total destruction of EJA's Falcon, for the loss of use of the aircraft for a period reasonably required to obtain a replacement, and for the salvage, raising and other costs incurred (A. 2, 4). The complaint seeks damages in the amount of \$1,763,643.64 (with interest), and contains the following allegations, among others:

7. On or about July 28, 1968, defendant Howard E. Dicken negligently and carelessly supervised and controlled, or failed to supervise and control, plaintiffs' Falcon; and negligently and carelessly failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which defendant Howard E. Dicken knew or

³ Photographs of the dead birds, the impact point, the cyclone fence and truck struck by the Falcon, the damage to the Falcon and similar matters are shown in the Appendix of Photograph Exhibits.

⁴ EJA also filed an action against Dicken's employer, the United States of America, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. That action, identical to the present action against Dicken except for the jurisdictional basis, is still pending in the United States District Court for the Northern District of Ohio, Eastern Division, as Civil Action No. C69-352.

should have known, including a huge flock of seagulls which were sitting on the active runway.

8. On and before July 28, 1968, the city and defendant Phillip A. Schwenz, and each of them, negligently and carelessly operated, controlled, maintained, supervised and inspected the airport; negligently and carelessly failed to remove and eliminate hazards to the aircraft existing on, over and adjacent to the airport, including the aforementioned flock of seagulls; and negligently failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which the city and defendant Phillip A. Schwenz knew or should have known, including the aforementioned flock of seagulls.

9. As a result of the aforementioned negligence and carelessness of defendants, and each of them, plaintiffs' Falcon struck several hundred seagulls shortly after take off from the airport when the flock flushed; and *the Falcon was totally destroyed when it crashed and sank into the navigable waters of Lake Erie off shore from the airport, all to plaintiffs' damage. . . .* (A. 3, 4, emphasis added.)

The City impleaded the United States of America seeking non-contractual indemnity (R. 14-17). After all pleadings were at issue (R. 9, 6) and following some initial discovery (A. 18-35), the City filed a motion pursuant to Rule 12(h)(3) Fed. R. Civ. P. suggesting to the district court that it lacked jurisdiction of the subject matter (R. 21). Dicken joined in the motion (R. 24). On June 12, 1970, the district court granted the City's motion and filed a memorandum and order dismissing EJA's complaint for lack of jurisdiction over the subject matter (R. 73-87). Relying on three Sixth Circuit cases, *Wiper v. Great*

Lakes Engineering Works, 340 F.2d 727 (6th Cir.), cert. denied, 382 U.S. 812 (1965); *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967); and *Gowdy v. United States*, 412 F.2d 525 (6th Cir.), cert. denied, 396 U.S. 960 (1969), the district court held (1) that the locality of the tort was over land because "the 'impact' of the alleged negligence occurred when the gulls disabled the plane's engines" (Pet. for Cert., App. B, pp. 36a-37a); and (2) that there was "no relationship between the 'wrong' alleged in this case and some maritime service, navigation or commerce upon navigable waters" (Pet. for Cert., App. B, p. 41a).

EJA appealed the dismissal to the Sixth Circuit under 28 U.S.C. § 1291. By a vote of two-to-one the court of appeals affirmed the judgment below. Chief Judge Phillips, writing for the majority, agreed with the district court's holding that "the alleged tort occurred on land, even though the plane fell into navigable waters . . ." (Pet. for Cert., App. A, p. 1a); but found it "not necessary to consider the question of maritime relationship or nexus . . ." (Pet. for Cert., App. A, p. 6a). Chief Judge Phillips did not rely on the three Sixth Circuit cases cited by the district court. Instead, he felt this case was controlled by three cases from this Court: *Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928); *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); and *The Admiral Peoples*, 295 U.S. 649 (1935).

In a seventeen page dissent Circuit Judge Edwards disagreed. He noted that in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), cert. denied, 375 U.S. 940 (1963), the Third Circuit held that the federal courts have maritime jurisdiction over airplane

crashes in navigable waters where the cause of the crash was alleged to be tortious conduct which occurred on land. He agreed with the Third Circuit's reasoning in *Weinstein* that such cases are within the admiralty jurisdiction because "When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels (*Id.* at 763). He felt that this case required the Sixth Circuit to accept or reject *Weinstein*, and concluded that in his view it "should adopt the Third Circuit rule of *Weinstein, supra*" (Pet. for Cert., App. A, p. 25a). In a separate concurring opinion Circuit Judge McCree agreed "as a matter of policy, with much of what Judge Edwards has written in support of the view that 'air ships . . . are within the maritime jurisdiction when they crash on navigable waters'" (Pet. for Cert., App. A, p. 8a). However, he concluded that the question was "foreclosed" by this Court's opinions in the cases cited by Chief Judge Phillips. He therefore joined in affirming the district court.

SUMMARY OF ARGUMENT

Two facts are not in dispute in this case: (1) EJA's aircraft crashed into navigable waters, and (2) it was totally destroyed when it crashed and sank in those navigable waters. Despite these two facts the court below dismissed EJA's admiralty claim for lack of subject matter jurisdiction, finding that the tort occurred over land because EJA's aircraft first became "disabled" over land. "The rule," the court of appeals wrote, "is that the situs of the tort is where the negligence becomes operative, not where the damages

or the major portion of them are sustained." (Pet. for Cert., App. A, p. 7a) The court below thought that this case was "controlled" by three cases from this Court: two longshoremen's compensation cases dated 1928 and 1935, *Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928), and *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); and one gangplank slip-and-fall case dated 1935, *The Admiral Peoples*, 295 U.S. 649 (1935). It also stated that its ruling did not conflict with the Third Circuit's decision in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), cert. denied, 375 U.S. 940 (1963).

The court of appeals erred in dismissing EJA's complaint for lack of admiralty jurisdiction. It failed properly to apply the "locality rule" for maritime tort jurisdiction first announced in *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), which rule has been "constantly reiterated" by this Court for over a century. *Victory Carriers, Inc. v. Law*, — U.S. —, 30 L.Ed. 2d 383 (1971). In *Victory Carriers* this Court said, "The historic view of this Court has been that maritime jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on navigable waters of the United States." In *The Plymouth* this Court said that a tort "occurred" on land if the "injury complained of" was not complete on navigable waters. Conversely, in this case the "injury complained of"—the total destruction of EJA's aircraft—was not complete over land and the tort therefore did not occur there.

Furthermore, this case cannot be "reconciled" with the *Weinstein* holding. In *Weinstein* the Third Cir-

cuit, faced with a fact situation nearly identical to the present case, adopted a different rule—"that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty." 316 F.2d at 766. The *Weinstein* cases arose out of the crash of an aircraft into Boston Harbor. There, as here, the aircraft crashed in navigable waters shortly after takeoff because it became "crippled" over land when birds were ingested into its jet-powered engines. The *Weinstein* rule, which has been accepted for the last thirty years in *all* cases of aircraft crashing into, on or over navigable waters—either territorial or beyond one marine league from the shore—is in direct and irreconcilable conflict with the Sixth Circuit's rule pronounced in this case.

The court of appeals' view that this aviation admiralty case is "controlled" by longshoremen's compensation cases pre-dating the Longshoremen's Act is erroneous, unsound and unworkable in practical application to aviation and space activities. *Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928), a case heavily-relied upon by respondents and the court below, is of questionable vitality today even in its own field—maritime personal injury litigation brought by longshorement and harbor workers—and is not applicable to this case. Cases under the Longshoremen's Act, which became effective after *Smith & Son*, and the revolutionary changes surrounding harbor workers' remedies against shipowners for unseaworthiness both seaward and landward of the Jensen line, have made the "refined distinctions" of the cases relied upon by the court of appeals "of historic and academic interest

only." *Pure Oil Co. v. Snipes*, 293 F.2d 60 (5th Cir. 1961).

The *Weinstein* rule, which focuses on the locality of the crash, is the only workable rule for future aviation and space cases. The reason behind the *Weinstein* rule has been stated thus: "When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels." *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d at 763. To this statement the Circuit Judge dissenting in this case has added, "Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings on land. . . . In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers" (Pet. for Cer., App. A, p. 24a). The lower courts have noted that the aircraft cases present special problems, and the *Weinstein* rule adopts a practical approach in the solution of those problems. Injecting an outdated and amorphous test from aberrant longshoremen's compensation cases into the area of aviation and space admiralty cases will spawn litigation, create unnecessary complexities and engage the courts in metaphysical exercises to determine where "the substance and consummation of the occurrence which gave rise to the cause of action took place." With aircraft and spacecraft circling the globe at ever higher speeds and altitudes, such a rule has no virtues to recommend its use in cases of aircraft crashing in navigable waters. For these reasons the court below should be reversed and this Court should pronounce the following rule:

When an aircraft crashes in navigable waters tort claims arising out of the accident are within admiralty and maritime jurisdiction.

In finding that this case is within the admiralty and maritime jurisdiction this Court need not enter into any extended discussion concerning a "locality plus" rule. It will be sufficient here to adopt the following language from this Court's opinion in *Atlantic Transport v. Imbrovek*, 234 U.S. 52, 62 (1914): "If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters, was quite sufficient." The reason for this was stated by the Third Circuit in *Weinstein* and concurred in by the dissenting Judge in this case: "At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across the same waters." 316 F.2d at 763. To this the dissenting Judge in this case has added, "... [w]e should note that there is some maritime character to any flight of any airplane over any navigable water." (Pet. for Cert., App A, p. 25a)

For all these reasons the court of appeals should be reversed; EJA's claim held to be within the admiralty and maritime jurisdiction; and the case remanded to the district court for trial.

ARGUMENT

I

WHEN AN AIRCRAFT CRASHES IN NAVIGABLE WATERS TORT CLAIMS ARISING OUT OF THE ACCIDENT ARE WITHIN ADMIRALTY AND MARITIME JURISDICTION

EJA's complaint in this case alleges that its "Falcon was totally destroyed when it crashed and sank in the navigable waters of Lake Erie off shore from the airport. . . ." (A. 4). In dismissing this complaint for lack of subject matter jurisdiction both the district court and the court of appeals admitted that two facts were beyond question in this case:⁵

1. *EJA's aircraft crashed into navigable waters, and*
2. *It was totally destroyed when it crashed and sank in those navigable waters.*

Both courts reasoned that this case was not within the jurisdiction of admiralty because EJA's aircraft first became "disabled" over land; therefore, the "tort . . . occurred on land before the aircraft reached Lake Erie . . ." (Pet. for Cert., App. A, p. 6a). The legal test used by the court of appeals in reaching this conclusion

⁵The district court admitted that "In ruling on a motion to dismiss for lack of jurisdiction over the subject matter, the allegations of the complaint must be construed most strongly in favor of the plaintiff" (Pet. for Cert., App. B, p. 28a). Furthermore, the district court assumed EJA's "position that the damage to the plane from contact with the birds, fence and truck was minimal compared to the total destruction of the aircraft when it 'crashed and sank in the navigable waters of Lake Erie'" (Pet. for Cert., App. B, p. 31a). The court of appeals also admitted that EJA's "plane fell into navigable waters" and that "the aircraft was alleged to be a total loss as a result of the soaking in the waters of Lake Erie" (Pet. for Cert., App. A, pp. 1a-2a).

is stated by Circuit Judge McCree in his concurring opinion. He said:

The rule, as I understand it, is that the situs of the tort is where the negligence becomes operative, *not where the damages, or the major portion of them, are sustained* (Pet. for Cert., App. A, p. 7a, emphasis added).

A review of this Court's decisions concerning maritime tort jurisdiction and the many cases decided by the lower courts holding that tort claims arising out of the crash of an aircraft in navigable waters are cognizable in admiralty, show beyond any real doubt that the court of appeals' decision in this case is clearly erroneous and must be reversed.

A. The Historic View of This Court Has Been That the Maritime Tort Jurisdiction of the Federal Courts Is Determined by the Locality of the Accident.

The constitutional grant of power to the courts of the United States to administer the general maritime law is found in Article III, Section 2, which extends the judicial power "to all cases of admiralty and maritime Jurisdiction." This grant has been implemented by Congress in 28 U.S.C. § 1333. That statute gives to the district courts original jurisdiction of "Any civil case of admiralty or maritime jurisdiction." Mr. Justice Story was the first to struggle with the historic question of what cases were included in the grant. In the leading case of *DeLovio v. Boit*, 7 F.Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815), he said that admiralty jurisdiction "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresover they may be executed, or whatsoever may

be the form of the stipulations,) which relate to the navigation, business or commerce of the sea.”⁶ Two years earlier, in *Thomas v. Lane*, 23 F.Cas. 957, 960 (No. 13,902) (C.C.D. Me. 1813), Mr. Justice Story had said, “In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide.” Later, this test substituted navigable waters, including the Great Lakes, for tide waters in American admiralty law. *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851). Mr. Justice Story also stated the reason why, in admiralty jurisdiction, tort cases are “dependent upon locality.” In his Commentaries on the Constitution he said:

... [T]his class of cases has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce. It may materially affect our intercourse with foreign states, and raise many questions of international law, not merely touching private claims, but national sovereignty and national reciprocity. Thus, for instance, if a collision should take place at sea between an American and foreign ship, many important questions of public law might be connected with its just decision; for it is obvious that it could not be governed by the mere municipal law of either country. . . . And in other cases of salvage, the doctrines of international and maritime law come into full activity, rather than those of any mere municipal code. (a) There is, therefore, a

⁶ *DeLovio v. Boit* was followed by this Court in *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1871).

peculiar fitness in appropriating this class of cases to the national tribunals; since they will be more likely to be there decided upon large and comprehensive principles, and to receive a more uniform adjudication; and thus to become more satisfactory to foreigners. (2 Story on the Const. § 1670 (5th ed. 1891).)

When is a tort "located" on navigable waters? This question was first answered by this Court in 1866 in the landmark case of *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866). The rule stated there has "been constantly reiterated" by this Court in the century since that decision. *Victory Carriers, Inc. v. Law*, — U.S. —, 30 L.Ed.2d 383, 387 (1971). In *The Plymouth* negligence committed on board a ship tied up to a wharf in Chicago caused a fire on board ship which spread to the wharf and surrounding buildings. A libel was filed against the owners of the vessel to recover for the damage done to the wharf and buildings. This Court held that the tort involved was not a maritime tort and the case not cognizable in admiralty. It said:

It will be observed, that the entire damage complained of by the libelants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over maritime torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; . . .

* * *

But it has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that the origin

of the wrong was on the water, in other words, as the wrong began on the water (where the admiralty possessed jurisdiction), it should draw after it all the consequences resulting from the act. These mixed cases, however, will be found, not cases of tort, but of contract. . . . The cases of tort . . . are cases of personal wrongs, which commenced on the land; such as improperly enticing a minor on board a ship and there exercising unlawful authority over him. The substance and consummation of the wrong were on board the vessel—on the high seas, or navigable waters—and *the injury complete within admiralty cognizance*. It was the tortious acts on board the vessel to which the jurisdiction attached.

This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely: *that the wrong and injury complained of must have been committed wholly upon the high seas of navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction*. In other words, *the cause of damage, in technical language, whatever else attended it, must have been there complete*.

Much stress has been given to the fact . . . that the vessel which communicated the fire to the wharf and building, was a maritime instrument or agent, and hence, characterized the nature of the tort. . . . The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable water. . . . *Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance*. (70 U.S. (3 Wall.) at pp. 33-36)

The above-quoted language shows beyond question that the court of appeals did not apply the correct legal test in this case in determining the locality of the tort. There has never been any dispute in this case that the "injury complained of" was not complete on land. As Circuit Judge Edwards correctly pointed out in his well-reasoned and scholarly dissent:

... The damage complained of is damage occasioned by crashing into and sinking into navigable waters.⁴

⁴ I attach no significance to the fact that the descending plane struck the top of a truck and the perimeter fence of the airport before crashing into Lake Erie. *This record makes clear that the impact on the water and the sinking of the plane with its consequent water damage accomplished the destruction complained of.* (Pet. for Cert., App. A, p. 25a, emphasis added).

It is true that in 1948 Congress gave plaintiffs in "ship-to-shore" tort cases a remedy in admiralty against the vessel or the shipowner with the passage of the Admiralty Extension Act.⁷ It is also true that the "rule of locality in cases of marine torts" laid down in *The Plymouth* has been "constantly reiterated" by this Court. See, e.g., *The Philadelphia, Wilmington and Baltimore R.R. Co. v. The Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209, 215 (1860); *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 25 (1871); *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316, 319 (1908); *Atlantic*

⁷ The Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, provides in part:

The Admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

Transport Co. v. Imbrovek, 234 U.S. 52, 59-60 (1914); *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 476 (1922); *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 273 (1922); *London Guarantee & Accident Co. v. Industrial Accident Commission of the State of California*, 279 U.S. 109, 123-124 (1929); *Hess v. United States*, 361 U.S. 314, 318 (1960); *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 215, n. 7 (1969); *Victory Carriers, Inc. v. Law*, — U.S. —, 30 L.Ed.2d 383, 387 (1971). In the *Hess* case a carpenter foreman drowned in the navigable waters of the Columbia River while working on the Bonneville Dam when a tug and barge he was on capsized because the spillway gates had been left open. This Court said:

The petitioner argues that "the place where the act or omission occurred" was on the dam itself, an extension of the land, and that, therefore, this case should be decided in accordance with the law that Oregon would apply to torts occurring on land. It is clear, however, that the term "place" in the Federal Torts Claims Act means the political entity, in this case Oregon, whose laws shall govern the action against the United States "in the same manner and to the same extent as a private individual under like circumstances." 28 USC § 2674. There can be no question but that Oregon would be required to apply maritime law if this were an action between private parties *since a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law*. The *Plymouth* (*Hough v. Western Transp. Co.*) (US) 3 Wall 20, 35, 36, 18 L ed 125, 128. (361 U.S. at 318, n. 7, emphasis added).

And in *Victory Carriers Inc. v. Law* this Court recently said:

The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is

determined by the *locality of the accident* and that maritime law governs only those torts occurring on navigable waters of the United States. (30 L. Ed.2d at 387, emphasis added.)

It seems beyond dispute that the "locality of the accident" in this case is where the aircraft crashed—on the navigable waters of Lake Erie. Thus, the court of appeals' view that "the situs of the tort is where the negligence becomes operative, not where the damages, or the major portion of them, are sustained."⁸ is clearly erroneous; and its decision based upon the application of this erroneous rule—that "the tort in this case occurred on land"—⁹ must be reversed.

B. The Court of Appeals Decision in This Case Is in Direct and Irreconcilable Conflict With the Third Circuit's Decision in Weinstein and Contrary to Every Reported Decision Concerning Aircraft Crashes in Navigable Waters.

As Circuit Judge Edwards pointed out in his dissenting opinion, there are no decisions from this Court concerning tort claims arising out of aircraft crashes in navigable waters, but there are many lower court cases which have considered the question whether such claims are cognizable in admiralty. The court of appeals holding in this case not only stands alone against *all* such reported decisions, it is in direct and irreconcilable conflict with the leading Circuit Court of Appeals case in this area, *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963), a case which has been followed many times and which is nearly identical in its facts to the present case. A review of these aviation cases illustrates the correct-

⁸ Pet. for Cert., App. A, p. 7a.

⁹ Id. at 6a.

ness of the rule they espouse—that when an aircraft crashes in navigable waters tort claims arising out of the accident are cognizable in admiralty—because, in the words of Chief Judge Biggs, “Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging.” *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d at 763. These cases also show that the holding of the court of appeals in this case is such a departure from all prior authority and is in such irreconcilable conflict with the Third Circuit’s rule on this same matter of federal law as to call for the exercise of this Court’s power “to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts.”¹⁰ That power should be exercised to reverse the court below.

The first reported case to come before a lower court involving the crash of an aircraft in navigable waters is *Choy v. Pan American Airways Co.*, 1941 A.M.C. 483 (S.D.N.Y. 1941). The action there was for the death of a passenger in a seaplane which had crashed crossing the Pacific Ocean. The court had to decide whether the plaintiff had a claim under the Death on the High Seas Act, 46 U.S.C. § 761, a statute passed by Congress in 1920 before the advent of commercial aviation. That statute provides:

§ 761. *Right of action; where and by whom brought.*

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on

¹⁰ Address of Chief Justice Vinson before American Bar Association, September 7, 1949, 69 S.Ct. v, vi.

the high seas beyond a maritime league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued.

The district court found that the statute was broad enough to give the plaintiff a claim. It said there was no reason why the phrase "on the high seas" should make the law operable "only on a horizontal plane." 1941 A.M.C. at 484. The court rejected the contention that § 177 of the Air Commerce Act of 1926, 49 U.S.C. § 171, the predecessor of § 1509(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1301, precluded such a finding.¹¹

In 1943 a New York State court reached the same conclusion in a case involving the disappearance without a trace of an aircraft in the South Pacific. *Wyman and Bartlett v. Pan-American Airways, Inc.*, 45 N.Y.S.2d 420 (1943), *aff'd*, 48 N.Y.S.2d 458, *leave denied*, 49 N.Y.S.2d 271, *cert. denied*, 324 U.S. 882 (1944). In 1951 a district court found the statute applicable in a case involving the crash of a light aircraft in Massachusetts Bay more than one marine league from Boston where the crash was allegedly caused by negligent failure to inspect the

¹¹ It will be noted that the City makes the same argument in this case, thirty-one years later. See City's Brief opposing *Certiorari*, p. 13; Reply Brief for Petitioners, pp. 14, 15. 49 U.S.C. § 1509(a) provides that "the navigation and shipping laws of the United States . . . shall not be construed to apply to seaplanes or other aircraft. . . ."

aircraft while it was on land, notwithstanding the phrase "Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas." *Lacey v. L. W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. Mass. 1951). The court concluded that "when the statute speaks of 'wrongful act, neglect, or default occurring on the high seas,' it contemplates the substance of the occurrence which resulted in death and gave rise to a right to recover." *Id.* at 918, emphasis in the original. It said that the substance of the occurrence was not merely the act or failure to act while the aircraft was on land; but that "the effect of such failure was not spent *until the plane fell to the sea.*" *Id.* at 918, emphasis added. The court concluded, "This is a maritime tort, and upon it the libellant's claim rests." *Id.* at 918.

The leading death case holding that the crash of an aircraft at sea gives rise to a maritime tort cognizable only in admiralty under the Death on the High Seas Act is *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Calif. 1954). In a scholarly and often-cited opinion Judge Goodman came to grips with the question of aircraft crashes in admiralty waters. It was argued in the case that the statute had "no application to deaths resulting from the operation of aircraft *over* the high seas." *Id.* at 91, emphasis in the original. At the outset Judge Goodman noted:

At the beginning of the development of aviation in the United States there was a considerable body of opinion that the entire ocean of air surrounding the earth is within the admiralty jurisdiction, and that consequently all air flight is within the admiralty and maritime jurisdiction of the federal government. This theory never received general acceptance and the federal legisla-

tion regulating air navigation has been based on the Commerce Clause of the Constitution. However, the question whether the airspace over the seas is within the jurisdiction of admiralty has received little attention and remains an open one. See Knauth, "Aviation and Admiralty," 6 Air Law Review 226 (1935); Veeder, "The Legal Relation between Aviation and Admiralty," 2 Air Law Review 29 (1931); Report of the Special Committee on the Law of Aviation of the American Bar Association, 46 American Bar Association Reports 77-97, 498-530 (1921); Bogert, "Problems in Aviation Law," 6 Cornell Law Quarterly 271, 303-305 (1921). In 1952, the Congress expressly declared by statute that any aircraft, belonging to the United States or to any United States citizen or corporation, while in flight above the high seas is within the maritime jurisdiction of the United States for the purposes of the criminal statutes. 66 Stat. 589, 18 U.S.C. 7. (121 F. Supp. at 91, n. 23).¹²

He then stated the locality test as pronounced in *The Plymouth*, and went on to say:

In applying the "locality" test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action. In so far as appears from the complaint in this action, the wrongful act charged to defendant produced no actionable injury *until the aircraft plunged into the sea*. The tort occurred upon the high seas within the admiralty jurisdiction. (121 F. Supp. at 92, emphasis added).

¹² In his dissenting opinion in this case Judge Edwards also thought 18 U.S.C. § 7(5) indicated that "Congress has recognized maritime jurisdiction over aircraft flying over, resting upon, or crashing into navigable waters." (Pet. for Cert., App. A, p. 12a).

As in *Choy*, it was argued that § 7 of the Air Commerce Act, 49 U.S.C. § 177, removed deaths resulting from airplane crashes from the ambit of the Death on the High Seas Act. In rejecting this argument Judge Goodman stated:

... The purpose of the Air Commerce Act of 1926 was to foster civil aviation by establishing federal aids to navigation and federal safety regulations. The Act authorized regulations for the examination, rating, and registration of aircraft and airmen, and air traffic rules for the navigation, protection, and identification of aircraft. Section 7 was intended to prevent any conflict between the existing federal regulations respecting the navigation of vessels and those to be promulgated respecting the navigation of aircraft. The term "navigation and shipping laws" as used in Section 7 of the Act obviously refers to those federal laws specifically governing the navigation and operation of the merchant marine. The term was never intended to include a general admiralty statute such as the Death on the High Seas Act. (121 F. Supp. at 93).

Since Judge Goodman's opinion in *Wilson* every court faced with a case involving the crash of an aircraft into navigable waters more than one marine league from the shore has held that the torts arising from the crash are maritime torts cognizable in admiralty, and that death claims arising therefrom come under the Death on the High Seas Act, notwithstanding the fact that the acts or omissions allegedly causing the crash occurred on land. *E.g.*, *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958) (Venezuelan airliner "burned, exploded, went out of control and crashed into the sea" thirty miles off New Jersey coast allegedly as a result of tortious acts committed

within the territorial limits of the State of New York); *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D.N.Y. 1957) (same crash as *Noel*); *Trihey v. Transocean Air Lines, Inc.*, 255 F. 2d 824 (9th Cir.), *cert. denied*, 358 U.S. 838 (1958) (airliner crashed in Pacific Ocean allegedly as a result of improper maintenance practices on land); *National Airlines, Inc. v. Stiles*, 268 F. 2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959) (airliner crashed in Gulf of Mexico during storm allegedly as a result of failure to provide pilot with proper weather information on land); *Guess v. Read*, 290 F. 2d 622 (5th Cir. 1961), *cert. denied*, 368 U.S. 957 (1962) (helicopter crashed in Gulf of Mexico after leaving drilling barge allegedly as a result of defective manufacture and "unairworthiness"); *Montgomery v. Goodyear Aircraft Corp.*, 392 F. 2d 777 (2d Cir.), *cert. denied*, 393 U.S. 841 (1968) (Navy airship crashed off coast of New Jersey killing 18 crewmen allegedly as a result of defective manufacture); *Noel v. United Aircraft Corp.*, 342 F. 2d 232 (3d Cir. 1964) (same crash as *Noel* and *Fernandez*, *supra*); *Krause v. Sud-Aviation*, 413 F. 2d 428 (2d Cir. 1969) (helicopter crashed in Gulf of Mexico as a result of defective manufacture in France); *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447 (E.D. N.Y. 1971) (death of crew member of Navy jet bomber who fell out of aircraft over high seas. "... [W]hether the tort is deemed to have occurred in the airspace over the high seas (i.e., at the moment when the decedent exited the plane) or on the high seas (i.e., at the point of impact with the water), the exercise by this court of admiralty jurisdiction is clearly warranted." 329 F. Supp. at 455). In those cases where an aircraft crashed in navigable waters beyond one marine league from the shore and

resulted in personal injuries to the occupants of the plane rather than death, the courts have held that the personal injury claims are maritime torts within the jurisdiction of admiralty. *E.g., Horton v. J & J Aircraft, Inc.*, 257 F. Supp. 120 (S.D. Fla. 1966); *Bergeron v. Aero Associates, Inc.*, 213 F. Supp. 936 (E.D. La. 1963).

Throughout this litigation the City and Dicken have argued that all of the above authority should be disregarded because the Death on the High Seas Act is not applicable to this case, the crash having occurred on territorial navigable waters and no one having been killed. In answer it would be enough to say, as Chief Judge Biggs said in *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758, 763, "An apt analogy to the situation at bar can be drawn, we conclude, from the cases construing the Federal Death on the High Seas Act. . . ." See also Judge Edwards' dissenting opinion in this case, Pet. for Cert., App. A, pp. 12a, 13a. But EJA is not limited to arguing by analogy in this case, for there are also reported cases involving aircraft crashes into territorial navigable waters where the causes are alleged to be tortious conduct occurring on land. In these cases, as in the death and personal injury cases occurring on the high seas, the courts have concluded that the torts arising out of such crashes are maritime torts cognizable in admiralty. *E.g., Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758 (3d Cir.), cert. denied, 375 U.S. 940 (1963); *Scott v. Eastern Airlines, Inc.*, 399 F. 2d 14 (3d Cir.), cert. denied, 393 U.S. 979 (1968) (same crash as *Weinstein*; Third Circuit sitting in bank affirms *Weinstein* holding of admiralty jurisdiction); *Hornsby v. The Fishmeal Co.*, 431 F. 2d 865 (5th Cir. 1970) (mid-air collision be-

tween two light aircraft which crashed in the Gulf of Mexico within one marine league of the Louisiana shore resulting in the deaths of both pilots. Fifth Circuit held both plaintiffs had causes of action for wrongful death in admiralty under the general maritime law after this Court's decision in *Morgane v. States Marine Lines*, 398 U.S. 375 (1970). Property damage claim for the value of the aircraft also a maritime tort. See district court's opinion, 285 F. Supp. 990 at 991 (W.D. La. 1968)); *Harris v. United Airlines*, 275 F. Supp. 431 (S.D. Iowa 1967) (Boeing 727 jet "fortuitously" crashed into the navigable waters of Lake Michigan within the territorial boundaries of the State of Illinois. The court said, "The weight of authority is that locality alone determines whether or not a tort claim is within admiralty jurisdiction. See *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758 (3d Cir. 1963). While several of the alleged acts of negligence in this case would necessarily have been committed on land, *the effects of the alleged negligence occurred on navigable waters*. No more is required to invoke the admiralty jurisdiction of this court and call for the application of maritime principles." 275 F. Supp. at 432, emphasis added.)

The leading case holding that tort claims arising out of aircraft crashes on territorial navigable waters is *Weinstein*, 316 F. 2d 758. The district court in this case did not try to distinguish *Weinstein*. It simply concluded that it was bound by the Sixth Circuit's "minority position which requires some maritime nexus," rather than by the Third Circuit's rule (Pet. for Cert., App. B, p. 33a). See *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967)

and *Gowdy v. United States*, 412 F.2d 525 (6th Cir.), cert. denied, 396 U.S. 960 (1969). The court of appeals realized that if it found that the alleged tort occurred over land there was no need to consider the question of maritime nexus. That realization, however, left the court of appeals face to face with the *Weinstein* decision. It resolved the dilemma by "reconciling" the present case with *Weinstein* in the following manner:

As we read that decision [*Weinstein*], the test for admiralty jurisdiction over torts stated at 316 F.2d at 761 produces the same result we have reached when applied to the facts of the present case. (Pet. for Cert., App. A, p. 6a, emphasis added).

EJA respectfully submits that the above-quoted statement is erroneous and cannot withstand analysis; and that Judge Edwards' conclusion "that the facts of this case require us to accept or reject *Weinstein*" is the only correct view of this case (Pet. for Cert., App. A, p. 11a).

The court of appeals reasoned that this case could be reconciled with *Weinstein* because the tort in this case occurred over land when EJA's Falcon hit the seagulls and its engines became crippled; while in *Weinstein* the tort occurred over navigable water when the aircraft crashed into Boston Harbor. To reach such a conclusion one must totally disregard the actual facts of the Boston Harbor crash—facts which are chillingly identical to the facts of this crash. The facts of the Boston Harbor crash are reported in *Rapp v. Eastern Air Lines, Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967)—one of the approximately 150 cases brought in

federal courts in Philadelphia and Boston as a result of the Boston Harbor tragedy—as follows:

On October 4, 1960, Eastern Air Lines Flight 375 crashed into the waters of Boston Harbor just outside Logan Airport in Boston, Massachusetts. The plane was on a commercial flight from Boston to Philadelphia. Fifty-nine passengers and the three crewmen were killed; 10 persons survived. The airplane was a Lockheed 188 Electra, a four-engine turbo-prop aircraft. The 501-D-13 engines had been designed and built by General Motors.

The flight took off from runway 9 which is 7,021 feet in length. The taxi out to the runway, the take-off roll, the lift-off and the climb were all normal. The aircraft climbed naturally to about 200 feet, when a burst of flame erupted very briefly and quickly from number one engine. After the burst of flame, the aircraft continued to climb for 200-300 feet, reaching a maximum of 400-500 feet, when the number one engine came to a complete stop and the propeller on number one was seen to rotate slowly. The aircraft then made a flat left turn and returned to its original heading parallel to the runway. Thereafter, the plane made another flat turn, the nose went up and it began to climb, after which it went into a steep left bank, with the right wing high. The crash followed. *A total of 47 seconds had elapsed from the take-off to the time of the disaster.*

The plane met a flight of starlings about 6/10ths of a mile from the beginning of the runway. Estimates of the amount of dead starlings found on the runway varied from 50 to 100. Five to ten dead gulls were also found in the same general area. A sufficient amount of bird material had penetrated into the air inlet of the plane as to cause the auto-feathering device to shut off number one engine or so as to cause a flameout and the crew to shut

off number one engine. At any rate, the ingestion of the birds into the air inlet caused the number one engine to shut off. (264 F. Supp. at 675; emphasis added)

The district court in *Weinstein* dismissed the libels filed in seven cases for lack of subject matter jurisdiction, holding that "Admiralty jurisdiction does not encompass tortious causes of action arising from crashes of airplanes into the navigable waters of a state." *Weinstein v. Eastern Airlines, Inc.*, 203 F. Supp. 430, 431 (E.D. Pa. 1961). In reaching this conclusion Judge Van Dusen said:

... [R]esearch has failed to disclose any case where it has been held that admiralty had jurisdiction simply because an airplane, as opposed to a seaplane, crashed into the navigable waters of a state.

* * *

"... Just as vessels were the source of admiralty, they remain the focal point of admiralty jurisdiction. In very general terms, admiralty jurisdiction relates to things occurring on or to vessels or as a result of the employment of vessels."

* * *

"Transactions are maritime only when connected with a vessel." Robinson, Admiralty, § 8 (1939).

* * *

... Therefore, until Congress establishes such jurisdiction by statute, admiralty jurisdiction does not encompass causes of action arising from crashes of airplanes into the navigable waters of a state. ...

(203 F. Supp. at 432, 433).

The Third Circuit rejected this narrow view of admiralty jurisdiction and reversed Judge Van Dusen. *Weinstein*, 316 F.2d 758. Chief Judge Biggs' learned opinion, well-grounded in the ancient law of admiralty and prophetic in its outlook, has withstood criticism¹³ and the test of time; and has been cited, followed and quoted by many courts in the nine years since it was written. Judge Biggs said:

The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; i.e., the place where it happened. *If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required.*

* * *

Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging. In *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 52, 55 S.Ct. 31, 41, 179 L.Ed. 176 (1934), the Supreme Court, by Mr. Chief Justice Hughes, stated: "We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction

¹³ The City, unable to locate any aviation cases in support of its position, points out that the American Law Institute criticized *Weinstein* in 1969 in its *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, p. 231 (1969). It is clear that the ALI's criticism of the case stemmed from the problems involved in "borrowing" a state's substantive law in those death cases occurring in territorial navigable waters. *E.g.*, *Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir.), cert. denied, 393 U.S. 979 (1968); *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). All such problems have now been laid to rest by this Court's decision in *Morange v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which recognized a remedy for wrongful death under the general maritime law.

be abandoned, as, for example, they were abandoned is discarding the doctrine that the admiralty jurisdiction was limited to tidewaters."

* * *

... If, as it has been held, a tort claim arising out of the crash of an airplane beyond the one marine league line is within the jurisdiction of admiralty, then *a fortiori* a crash of an aircraft just short of that line but still within the navigable waters is within that jurisdiction as well. To hold otherwise would be to impose an illogical and irrational distinction on the operation of the broad grant of admiralty jurisdiction extended by the Constitution and implemented by 28 U.S.C.A. § 1333.

It is true that the libels in the cases on appeal allege, *inter alia*, negligence in the inspection and maintenance of the aircraft. These allegations refer to allegedly negligent acts committed on land for we cannot assume, in the absence of express averments to such effect, that maintenance of an aircraft or inspection thereof except for emergency purposes takes place in flight. Nonetheless, *if the disastrous effects of failure to properly inspect or maintain the aircraft occurred on navigable waters, as was alleged in the instant cases, the tort claims must be deemed to be within the admiralty jurisdiction.*

* * *

We are of the opinion for the reasons stated that the tort claims *sub judice* lie within the admiralty jurisdiction of the court below.

* * *

We hold, therefore, that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty. (316 F.2d at 761, 763, 765, 766, emphasis added.)

As in the *Choy* and *Wilson* cases it was argued that § 1509(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1509(a), precluded the exercise of admiralty jurisdiction as to aircraft crashes in navigable waters. "The brief correct answer to this contention," the court said, "is that the Federal Aviation Act is not a statute intended either to create or to limit judicial jurisdiction." 316 F.2d at 765. In *Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir.) cert. denied, 393 U.S. 979 (1968), the Third Circuit sitting in bank affirmed the *Weinstein* panel's holding of admiralty jurisdiction.

The City has argued that *Weinstein* can be reconciled with this case because neither the trial court in *Weinstein* nor the Third Circuit was apparently aware of the fact that the cause of the Boston Harbor crash was bird ingestion into the aircraft's jet engines over land during takeoff. And they imply that had the Third Circuit only known of this fact it would have concluded that the locality of the tort was over land by virtue of the "controlling" longshoremen's compensation cases cited by it and relied on by the court below in this case. This argument is totally without merit. Judge Biggs pointed out in his opinion that "the libels in the cases on appeal allege, *inter alia*, negligence in the inspection and maintenance of the aircraft," which allegations refer to "negligent acts committed on land." 316 F.2d at 765. The allegations referred to can be read in the libels on file with the record in *Weinstein* in the Third Circuit. These allegations include the following:

8. On or about October 4, 1960, libellant's decedent was a passenger for hire in a certain Lockheed Electra Airplane N5533, owned, operated, possessed and controlled by Eastern Airlines, Inc.,

as a common carrier on a regularly scheduled flight to Philadelphia and points south, designated as Flight No. 375, which had departed from the Logan International Airport in Massachusetts at approximately 4 p.m.

9. Shortly after the said aircraft had become airborne, following takeoff from the said airport, *by reason of the negligence of the respondents, and each of them, and by virtue of their respective breaches of warranties said aircraft crashed into the navigable waters of Boston Harbor, causing libellant's decedent to suffer severe and disabling injuries resulting in his death.*

10. The respondent United States of America, through its various agencies including the Civil Aeronautics Administration, Civil Aeronautics Board and Federal Aviation Agency, through their respective agents, servants, workmen and employees, was careless and negligent under the circumstances, and by reason thereof proximately caused the injuries and death of the libellant's decedent, under the circumstances, in and by:

* * *

(f) *failing to take prompt, proper and adequate measures to meet the problem of bird ingestion by planes using said airport and to require proper and adequate measures to be taken to protect against said hazard;*

(g) *failing to exercise proper and adequate control over take-off of the aforesaid aircraft;*

* * *

15. The aforesaid crash and resulting injury and death of the libellant's decedent were caused by the carelessness and negligence of the respondent Lockheed Aircraft Corporation by its agents, servants, workmen and employees, under the circumstances in:

* * *

(c) *faling to properly and adequately test the power plants, the various component parts, control devices and instrumentations thereof incorporated into said aircraft for bird ingestion;*

(d) *failing to properly and adequately design, equip, test, alter, repair and replace air intakes, instrumentation and controls over power plants of said aircraft to permit safe take-off under circumstances where birds might be encountered.*

* * *

17. Solely by reason of the carelessness and negligence of the respective respondents, as aforesaid, and the breach of warranties by each of them, as set forth hereinabove, *libellant's decedent was caused to suffer painful and severe injuries and to wage an unsuccessful struggle for survival, as a consequence of which he succumbed to his injuries and or the elements, including the waters of the harbor in which the plane has crashed, and died therefrom.*¹⁴

With regard to the above allegations of negligence Judge Biggs went on to say, "if the *disastrous effects* of failure to properly inspect or maintain the aircraft occurred on navigable waters, as was alleged in the instant cases, the tort claims must be deemed to be within the admiralty jurisdiction." 316 F.2d at 765. It is obvious that the "disasterous effects" of the negligence which occurred on navigable waters refers to the crash of the aircraft into Boston Harbor, not the meeting of "a flight of starlings about 6/10ths of a

¹⁴ Consolidated Brief and Appendix for Appellants in *Weinstein v. Eastern Airlines, Inc.*, United States Court of Appeals for the Third Circuit, Nos. 14023-14029, at pp. 5a-14a, emphasis added.

mile from the beginning of the runway" which resulted in bird ingestion into the jet-powered engines and caused "the auto-feathering device to shut off number one engine or so as to cause a flameout and the crew to shut off number one engine." *Rapp v. Eastern Air Lines, Inc.*, 264 F. Supp. at 675.

It is equally lame to argue that Judge Van Dusen was unaware of the actual facts of the Boston Harbor crash. In *Rapp v. Eastern Air Lines, Inc.*, 264 F. Supp. 673, 675, the court said, "A total of 47 seconds had elapsed from the take-off to the time of the disaster." In *Weinstein v. United States*, 200 F. Supp. 448 (E.D. Pa. 1961), a second opinion written by Judge Van Dusen in cases arising out of the Boston Harbor crash, he said, "These admiralty actions . . . arise out of the crash of an airplane in navigable waters of Boston Harbor *one minute after lift off* from Logan International Airport, Boston, on October 4, 1960 . . ." (200 F. Supp. at 449, emphasis added). No one could seriously argue that a judge who knows that a plane crashed "one minute after lift off" from an airport could be unaware that the plane became "disabled" over land.

The simple truth is, in *Weinstein* the Third Circuit was squarely faced with the question of whether a case involving the crash of an aircraft into navigable territorial waters was cognizable in admiralty. The airplane had crashed shortly after takeoff because it became "crippled" over land when birds were ingested into its jet-powered engines. It "fortuitously" crashed in navigable waters nearby. Nevertheless, the Third Circuit held that such a case was within the jurisdiction of admiralty. In view of the amazing similarity

between the facts in this case and the facts of the Boston Harbor crash, there is no escape from the conclusion that the Sixth Circuit's decision here is in direct and irreconcilable conflict with the Third Circuit's decision in *Weinstein*. Judge Edwards acknowledged this conflict in his dissenting opinion when he said:

... There are legal and policy questions of great portent for the future which this case requires us to answer. I believe that the facts of this case require us to accept or reject *Weinstein, supra*, and thus, to decide for this Circuit whether air ships, which are increasingly displacing water-borne ships in maritime commerce, are within the maritime jurisdiction when they crash on navigable waters (Pet. for Cert., App. A, p. 11a).

EJA submits that for all the reasons stated in (1) Judge Biggs' opinion in *Weinstein*, (2) Judge Edwards' dissenting opinion in this case, (3) the many lower court aviation admiralty cases both before and after *Weinstein*, and (4) this brief for Petitioners, this Court should decide that "air ships, which are increasingly displacing water-borne ships in maritime commerce, are within the maritime jurisdiction when they crash on navigable waters," and reverse the court below. (Pet. for Cert., App. A, p. 11a).

C. The Longshoremen's Compensation Cases Which the Court of Appeals Found "Controlling" Are Not Applicable to This Case.

Except for a brief reference to *Weinstein*, 316 F.2d 758, the court below in its opinion did not discuss, cite or attempt to distinguish any of the many admiralty

cases involving aircraft crashes in navigable waters. Instead, it said this case was "controlled" by three cases from this Court: two longshoremen's compensation cases dated 1928 and 1935, *Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928), and *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); and one gangplank slip-and-fall case dated 1935, *The Admiral Peoples*, 295 U.S. 649 (1935). In concurring with Chief Judge Phillips, Circuit Judge McCree said, "I agree, as a matter of policy, with much of what Judge Edwards has written in support of the view that 'air ships . . . are within the maritime jurisdiction when they crash on navigable waters'" (Pet. for Cert., App. A, p. 8a). But he too concluded that the question of locality of the tort was "foreclosed" by the above cases from this Court. It is interesting to note that neither in *Weinstein*—a case in which the aircraft became "disabled" over land—nor in *any* of the many reported aviation admiralty cases can one find a discussion of or a reference to these three cases which the court of appeals found "controlling." A review of these three cases and the historical context in which they were decided shows why they have not been discussed in aviation admiralty cases; why they are not applicable to this case; why their "refined distinctions are now of historic and academic interest only," *Pure Oil Co. v. Snipes*, 293 F.2d 60, 65 (5th Cir. 1961); and why these refined distinctions should not now be injected into an area which has heretofore been free from "litigation-spawning confusion" because it is "easily susceptible of more workable solutions." *Moragne v. States Marine Lines*, 398 U.S. 375 404 (1970).

In *Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928)—a case heavily relied upon by the City and Dicken and found to be “controlling” in this case by the court of appeals—a longshoreman was standing on a stage which projected a few feet over the water near the side of a vessel but rested upon the wharf. A sling loaded with cargo was lowered over the side “by means of a winch on the vessel.” The sling was swinging back and forth and as the longshoreman tried to catch and steady it, “the sling struck him and knocked him off the stage into the water where sometime later he was found dead.” 276 U.S. at 181. This Court held that the tort occurred on the wharf, an extension of the land, and the case was therefore not within the admiralty and maritime jurisdiction.¹⁸ In a brief opinion Mr. Justice Butler wrote:

The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death.

The City’s argument has been the same throughout this case: the above language must be mechanically applied to the facts of this aircraft crash, and when that is done the conclusion is inescapable that the locality of the tort here is over land—where the aircraft first became disabled. That argument was accepted by the court below despite the fact that in thirty years of aviation admiralty cases *no* court had ever found *Smith & Son* to be applicable. Indeed, *Smith & Son* has little, if any,

¹⁸ In 1935 the converse of this factual situation was presented to this Court in *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935). That is, in *Minnie* the injured longshoreman was working on a vessel lying in navigable waters when struck by a sling and “precipitated” upon the wharf. This Court found the tort to be a maritime tort.

vitality today even in its own area—maritime personal injury litigation brought by longshoremen and harbor workers.

In 1904 Mr. Justice Holmes observed that "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." *The Blackheath*, 195 U.S. 361, 365 (1904). Nowhere is that phrase more applicable than in the field of maritime personal injury litigation — especially those cases brought by stevedores, longshoremen and other harbor workers engaged in an occupation which has "a higher injury frequently rate than any other high-hazard industry" in the nation. *Victory Carriers, Inc. v. Law*, — U.S. —, 30 L.Ed.2d 383, 393, n. 15. The story surrounding that field of litigation since the turn of the century is well known to this Court and has been stated several times in recent cases. *E.g.*, *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962); *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); *Victory Carriers, Inc. v. Law*, — U.S. —, 30 L.Ed.2d 383 (1971). In commenting on the revolution which has taken place concerning the rights of maritime workers and seamen for recovery for death and injury one writer has said:

Many of the old landmarks have disappeared for good. New ones have been tossed up, which may or may not be permanent additions to the map. There are unsuspected reefs whose existence will be determined by the usual method of hit or miss. The perils of the sea, which mariners suffer and shipowners insure against have met their match in the perils of judicial review.¹⁶

In order to put *Smith & Son* in its proper perspective

¹⁶ GILMORE & BLACK, *THE LAW OF ADMIRALTY* 248 (1957).

for this case it will suffice to summarize this revolution as follows: In 1914 when a stevedore injured in the hold of a vessel was before this Court in *Atlantic Transport v. Imbroke*, 234 U.S. 52 (1914) with a libel in admiralty, the common law defenses of contributory negligence, fellow servant rule, etc. were devastating to injured employees; no state workmen's compensation remedies were then available to longshoremen; there was no federal compensation act applicable to longshoremen and harbor workers; and longshoremen did not come within the traditional maritime remedies available to seamen under the general maritime law. See *The Osceola*, 189 U.S. 158 (1903). The injured longshoreman in *Imbroke* therefore filed a libel in admiralty against his employer on the ground that the tort involved was maritime. The employer argued that the tort was nonmaritime because it did not arise "out of an injury to a ship . . . or out of an injury to a person by the negligence of a ship." 234 U.S. at 61. In a historic opinion that has been followed to this day, Mr. Chief Justice Hughes said, "This view we deem to be altogether too narrow." *Id.* This Court allowed the longshoreman his remedy in admiralty saying, "As the *injury* occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met." 234 U.S. at 58, emphasis added.

By 1917 many states had passed workmen's compensation acts and the question for longshoremen became—can such acts constitutionally be applied where the tort involved is a maritime tort? In *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), in a five-to-four decision, this Court answered that question in the negative. As this Court noted in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 118 (1962), "The Jensen decision deprived

many thousands of employees of the benefits of workmen's compensation." In fact, it deprived compensation to all of those longshoremen injured "seaward of the Jensen line"—a line usually drawn at the gangplank of the ship. Two attempts by Congress to overrule *Jensen* legislatively failed. See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. Dawson & Co.*, 264 U.S. 219 (1924). The harsh results of *Jensen* began to become apparent in subsequent cases. In *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), for example, the widow and child of a stevedore killed seaward of the Jensen line went remediless.

In an effort to avoid such results this Court "handed down a number of decisions which appeared to modify *Jensen*. . . ." *Calbeck v. Travelers Ins. Co.*, 370 U.S. at 118. One such effort was the "maritime but local" exception which allowed state law to apply to "certain local matters . . . which would work no material prejudice to the general maritime law." *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 477 (1922). Another was a decision ruling that stevedores were "seaman" for purposes of the Jones Act,¹⁷ a statute passed by Congress in 1920 to provide the benefits of the Federal Employers Liability Act¹⁸ to seamen, and could therefore obtain redress under that statute. *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). Another way to avoid the harsh results of *Jensen* was to find that the tort occurred on land, thereby giving the longshoreman a remedy under the state workmen's compensation act. In *Smith & Son* the deceased longshoreman's widow sought and obtained state workmen's compensation benefits from the stevedore employer in a Louisiana

¹⁷ 46 U.S.C. § 688.

¹⁸ 45 U.S.C. §§ 51-60.

state court. On appeal the employer's defense was that no benefits were payable (and the state compensation act was inapplicable) because the tort involved was maritime. The widow, of course, sought to uphold her compensation award by arguing that the tort occurred landward of the Jensen line. As Judge Edwards noted in his dissenting opinion in this case:

I make no suggestion that there is a simple consistency to be found in the reasoning of all these cases.

Harsh facts frequently appear to have affected results. The *Smith & Sons* case, for example, preceded the effective date of the federal Longshoremen's Compensation Act and upheld a state compensation award. The holding of the court was to deny that "the case is *exclusively* within admiralty jurisdiction" as appellants therein were claiming. (Pet. for Cert., App. A, p. 15a).

The revolution in the law for longshoremen since the days when Mrs. Taylor's lawyer sued her husband's employer, Smith & Son, Inc., in Louisiana state court for workmen's compensation benefits have relegated the *Smith & Son* case to a virtual museum piece. First, Congress was finally successful in 1927 in passing a federal compensation statute applicable to harbor workers. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. It is important to note that Congress did not, in writing the jurisdictional portion of the Act, refer to such amorphous phrases as "where a cause of action arises." Instead, it made jurisdiction dependent upon where the *injury occurred*. Section 3 of the Longshoremen's Act, 33 U.S.C. § 903 (a), provides in part:

(a) Compensation shall be payable under this chapter in respect of disability or death of an em-

ployee, but only if the disability or death results from an *injury occurring* upon the navigable waters of the United States (including any dry dock) . . . (emphasis added).

In 1932 this Court upheld the constitutionality of the Longshoremen's Act, *Crowell v. Benson*, 285 U.S. 22 (1932). Mr. Chief Justice Hughes noted, "As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty jurisdiction." 285 U.S. at 39. And he pointed out that where navigability of the waters was not in dispute, it was the locality of the injury which determined "the existence of the congressional power to create the liability prescribed by the statute." *Id.* at 55.

How have the courts decided factual situations like those arising in *Smith & Son* under § 903 of the Longshoremen's Act? First, they have held that there is no difference between the "traditional test of admiralty jurisdiction" and "the test of whether an accident occurs 'upon navigable waters' under the Longshoremen's Act. . . ." *Caldaro v. Baltimore and Ohio R.R. Co.*, 166 F.Supp. 833, 836 (E.D.N.Y. 1956). And in two cases involving factual situations nearly identical to *Smith & Son*, two Circuit Courts of Appeal reached the conclusion that the claimants' awards under the Longshoremen's Act could stand because the torts were maritime. *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965); *O'Keeffe v. Atlantic Stevedoring Co.*, 354 F.2d 48 (5th Cir. 1965). In the *O'Keeffe* case a longshoreman was standing on the dock hooking on cargo which was being loaded into the hold of a ship by the ship's boom. One of the metal bands around the cargo caught

him by the leg as the cargo was being raised. He was jerked upside down and carried up with the cargo. The winch was stopped but the longshoreman fell loose, striking the ship with his head and then drowning in the slip. The district court enjoined the payment of compensation benefits under the Longshoremen's Act on the ground that the tort was nonmaritime. *Atlantic Stevedoring Co. v. O'Keeffe*, 220 F.Supp. 881 (S.D. Ga. 1963). It found that the following language of *Smith & Son* controlled: "the blow by the sling was what gave rise to the cause of action . . .," and "the substance and consummation of the occurrence which gave rise to the cause of action took place on the land." The district court said, "So far as I have been able to determine those doctrines of *Smith v. Taylor*, supra, as to causation and locality, have never been reversed and so far as I can determine, they have never been changed by legislation." 220 F.Supp. at 886. The Fifth Circuit reversed, saying, "It is true that *when the causal chain of events commenced*, Curry [the deceased] was on the dock and not upon navigable waters. But *the beginning of the causal sequence* was the lifting of Curry from the dock by the metal band suspended from the ship's boom. . . . We are firmly of the view that Curry sustained his injury over navigable water." 354 F.2d at 50, emphasis added.

In *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640 (2d Cir.), cert. denied, 382 U.S. 835 (1965), the longshoreman at the time of the accident was standing on a "skid"—a wooden platform extending from the wharf over the water. A pallet suspended from the vessel's cables broke, spilling cargo onto the skid and into the water. A case struck the longshoreman's leg and knocked him into the water. He did not drown

but suffered totally-disabling injuries. Compensation was awarded under the Longshoremen's Act and the Second Circuit, by a divided vote, affirmed. The Second Circuit said, "We believe *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928), inconclusive, as well as outdated, authority for the proposition that the skid must be considered an extension of land outside the reach of the Longshoremen's Act." 344 F.2d at 644. The dissenting judge said, "The decision of the court is contrary to decisions of the Supreme Court and of this court virtually identical in their factual setting. *T. Smith & Son, Inc. v. Taylor*. . . ." 344 F.2d at 647. A petition for certiorari was denied by this Court. 382 U.S. 835.

The Longshoremen's Act and the decisions thereunder are not the only reasons why *Smith & Son* is considered "inconclusive, as well as outdated authority" today. As a result of the "revolution" in the law in this area referred to above, longshoremen and their beneficiaries no longer even sue their employers for compensation benefits when injured or killed in the course of their employment. In 1944 and 1946 two decisions by this Court transformed a shipowner's liability to seamen for unseaworthiness of a vessel from a duty to use due care to an absolute duty. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). These decisions became important to longshoremen in 1953 when this Court held that a harbor worker injured on board a vessel while making repairs could sue the shipowner in admiralty on a claim of unseaworthiness. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). With longshoremen now considered to be "seamen" for purposes of admiralty claims against shipowners for injuries or death

caused by unseaworthiness, and with unseaworthiness amounting to absolute liability without fault, the entire format of harbor workers' personal injury litigation changed drastically. Today when a longshoreman is injured or killed seaward of the Jensen line, limited compensation is not sought from the stevedore employer under the Longshoremen's Act. Instead, an action is filed against the shipowner for unlimited damages under a claim of unseaworthiness, usually while the injured longshoreman receives voluntarily-paid compensation benefits from his employer, who will be reimbursed by the employee out of the longshoreman's judgment against the shipowner. And with the passage of the Admiralty Extension Act ¹⁹ by Congress in 1948, longshoremen injured landward of the Jensen line may follow this same format if their injury was caused by the unseaworthiness of the vessel or its cargo or cargo containers. See *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963); cf. *Victory Carriers, Inc. v. Law*, — U.S. —, 30 L.Ed.2d 383 (1971). Since Mr. Taylor was struck by a sling loaded with cargo which was being lowered over the side "by means of a winch on the vessel," 276 U.S. at 181, it is clear that if Mrs. Taylor's lawyer were handling her case today he would not seek limited compensation benefits under either a state workmen's compensation act or the Longshoremen's Act. He would instead sue the owner of the vessel for unlimited damages caused by unseaworthiness and/or negligence. It is this revolution which caused Judge John R. Brown of the Fifth Circuit to make the following observation about *Smith & Son*,

¹⁹ 46 U.S.C. § 740.

Minnie v. Port Huron and *The Admiral Peoples*²⁰ when deciding the case of an oil driller injured while working on a fixed drilling platform in the Gulf of Mexico when he fell from a tank on top of the platform, struck the platform deck 15 feet below, and dropped through a hole in the platform into the ocean 50 feet below, striking at least two more steel structure members on the way down:

... Many of these refined distinctions are now of historic and academic interest only since Congress cut through many of them by the 1948 Act which extends admiralty and maritime jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water,

²⁰ In discussing the reasoning behind the gangplank slip-and-fall cases like *The Admiral Peoples*, Mr. Benedict stated in his treatise:

Where a person falls from a vessel onto a pier, or, conversely, falls from a pier onto a vessel, or falls from a gangway or a ladder in passing between a ship and the shore, it was for a long time considered that the person, in going aboard the vessel, was still on shore until he passed the ship's rail, and conversely that in leaving the vessel, he was still on board until he arrived upon the solid pier or land. The Supreme Court, however, has now settled the matter by declaring that gangways (inferentially ladders) are always parts of the vessel; hence a person injured while on a gangplank or ladder is in every case to be considered as on board the ship, no matter whether he is coming aboard or going ashore at the moment. 1 BENEDICT ON ADMIRALTY 358 (6th Ed. 1940, Knauth Supp. 1971).

One commentator has made the following remark about *The Admiral Peoples*:

Since a "tort," a mental construction, doesn't "take place" anywhere, the application of this "test" gives rise to an open series of "and-now-what-if's," reminiscent intellectually of those discussions of fine points in the law of keeping bees which once rang in the Halls of Tara, and pictorially of the Marx Brothers running up and down gangplanks one jump ahead of the cops. Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Col. L.Rev. 259, 264 (1950).

notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C.A. § 740. (*Pure Oil Co. v. Snipes*, 293 F.2d 60, 65 (5th Cir. 1961))

If the "refined distinctions" of the three cases which the court below found to be controlling are "now of historic and academic interest only," what possible reason is there why they should now be engrafted for the first time upon cases involving crashes of aircraft into navigable waters—an area which has heretofore been free from "litigation-spawning confusion" because it is "easily susceptible of more workable solutions"? *Moragne v. States Marine Lines*, 398 U.S. 375, 404 (1970). For thirty years the aviation cases have looked to the locality of the accident—i.e., the crash itself—to determine admiralty tort jurisdiction. That is not only in keeping with "the historic view of this Court," *Victory Carriers, Inc. v. Law*, 30 L.Ed.2d at 387, it is in keeping with a common-sense, practical solution of problems which can and do arise in an area far more technologically complex and sophisticated than slip-and-fall cases. As the district court said in *Thomson v. Chesapeake Yacht Club, Inc.*, 255 F.Supp. 555, 557-558 (D. Md. 1965):

It is difficult, if not impossible, to reconcile the opinions in such cases as . . . *Wiper* [*Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir. 1965)] with the opinions in the . . . aircraft cases.

* * *

The aircraft cases present special problems. Although the negligence may have occurred on land, where there was negligent maintenance, the impact (effect) of the negligence on the passengers did not occur until something went wrong during the flight and the plane started to fall. Something may have started to go wrong over the land before the

plane reached the sea, but that is usually impossible to prove one way or the other in aircraft cases, *and the decisions adopt a practical approach.* (Emphasis added).

EJA submits that there is nothing practical about the approach adopted by the court below in this case. Instead of looking immediately to the impact point of the crash to determine admiralty tort jurisdiction—a point which is always determined by official accident investigators in any aircraft accident and which was determined in this case to be in the navigable waters of Lake Erie one-fifth of a statute mile from shore (A. 21)—the court below has ruled that the locality of the tort is to be determined by looking to the point where the aircraft first becomes “disabled.” As we have seen in this case, the result of such a rule is two years of appellate litigation discussing the fine points of where longshoremen first became injured. And it is a virtual certainty that this rule will spawn its share of litigation in the future as aircraft (and later spacecraft) fly higher and faster over land and sea. Aviation accident litigation is often multiparty and even multidistrict, and one side or the other usually desires to establish the applicability of one substantive law rather than another. Thus, under the rule established in this case the courts can look forward in the future to engaging in such metaphysical exercises as trying to determine where the “cause of action arises” where a supersonic transport crashes more than one marine league from the shore after radioing over New Jersey at 70,000 feet altitude that it is experiencing difficulty. Or the courts could grapple with the question of where “the substance and consummation of the occurrence which gave rise to the cause of action took place” when an aircraft experiences difficulty over land above an

airport located, as many airports are, at the water's edge and circles for an emergency landing, passing first over water, then land, then water, then land and finally crashing in navigable waters just off the end of the runway.

Looking backward over nearly 60 years of litigation in the field of longshoremen's personal injuries, and forward into the technological advances and complexities which can be expected in the field of aviation and space, one can find little in the former to recommend to the latter for adoption. For thirty years the aviation cases have progressed smoothly with the following rule: "tort claims arising out of the crash of a land-based aircraft on navigable waters are cognizable in admiralty." *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d at 761. The reasons behind such a rule were ably stated by Judge Biggs in *Weinstein* and Judge Edwards in his dissenting opinion in this case. Judge Biggs wrote in *Weinstein*:

... At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across these same waters. *When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels.* "There can be nothing more maritime than the sea." *Pure Oil Co. v. Snipes*, 293 F.2d 60, 65 at n. 6 (5 Cir. 1961) (316 F.2d at 763, emphasis added)

And in his dissenting opinion in this case Judge Edwards said:

I believe that there are many comparisons between the problems of aircraft over navigable

waters and those of the ships which the aircraft are rapidly replacing. We should take judicial notice that thousands of flights of aircraft take off daily (many from waterfront airports like Cleveland's Burke Lakefront) with flights planned over the oceans or over the Great Lakes.

I have previously noted that Congress appears to have thought that admiralty jurisdiction attached solely by flight over the high seas. We have, however, no need to go that far in our instant case. We deal here with a disabled plane which crashed upon and sank into the navigable waters of the Great Lakes. Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings upon land. Arguably, they might be greater or less, but they are not the same. In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers. I do not, by referring generally to these matters as being within judicial notice, mean to pass judgment on jurisdictional problems beyond the specific requirements of this case. *What I would hold is that tort cases arising out of aircraft crashes into navigable waters are cognizable in admiralty jurisdiction even if the negligent conduct is alleged to have happened wholly on land.* (Pet. for Cert., App. A, p. 24a, emphasis added).

There are other beneficial effects to the judicial system and to litigants from the *Weinstein* rule. At first blush the court of appeals' holding in this case might seem attractive to those holding a restrictive view of the jurisdiction of federal courts. Thus, in this very case one might conclude that the state court in Cleveland would be the most appropriate forum to deal with this case rather than the federal court there. Such an approach completely ignores the actual reali-

ties involved in aviation accident litigation. For example, in this case the Sixth Circuit has not reduced the work load of the district court in Cleveland; it has simply multiplied litigation by causing both the district court and the state court in that city to litigate the same issues of fact. That is, the United States (respondent Dicken's employer) could be sued here only in federal court.²¹ Thus, if the Sixth Circuit's opinion stands in this case EJA will not be able to have a joint trial against both tortfeasors in federal court, but will be forced to litigate its Tort Claims action against the government in federal court and conduct an identical law suit against the City in state court "across the street."²²

This phenomenon is a daily problem in aviation accident litigation because of the government's pervasive involvement in all aspects of aviation—such as air traffic control, regulation of air carriers and aircraft manufacturers, licensing of pilots, etc. A federal forum in aviation accident cases involving major accidents allows the litigants possible access to the Panel on Complex and Multidistrict Litigation (and transfer for discovery) under 28 U.S.C. § 1407; transfer for discovery and trial under 28 U.S.C. § 1404(a); and the ability to join the United States as a defendant or a third-party defendant. The application of federal general maritime law in admiralty cases insures uniformity of decisions and uniformity of results in multiparty cases, and eliminates complex choice of law problems. These everyday aspects of litigation do not escape the practitioner's notice in this field, and they undoubtedly account for the large number

²¹ 28 U.S.C. § 1346(b).

²² There is no diversity between EJA and the City.

of aviation accident cases being litigated in federal courts. The fact is, the Sixth Circuit's opinion here will *not* relieve the workload of the federal courts; it will simply multiply litigation and increase the workload of the entire court system—state and federal.

For all of the above reasons EJA submits that this Court should reverse the court below and establish the following rule for aviation cases:

When an aircraft crashes in navigable waters tort claims arising out of the accident are within admiralty and maritime jurisdiction.

II

If More Is Required Than the Locality of the Tort in Order to Give Admiralty Jurisdiction, the Relation of the Wrong in This Case to Maritime Service, Navigation, and Commerce on Navigable Waters Is Quite Sufficient

Despite the fact that the district court in this case found that the locality of the tort was over land, it went on to hold that "there exists no relationship between the 'wrong' alleged in this case and some maritime service, navigation or commerce upon navigable waters." Pet. for Cert., App. B, p. 41a. The court of appeals affirmed the district court's finding as to the locality of the tort and said, "it is not necessary to consider the question of maritime relationship or nexus. . . ." Pet. for Cert., App. A, p. 6a. In view of this posture of the case it will not be enough for this Court simply to reverse the court of appeals' conclusion as to the locality of the tort. This Court must affirmatively find that this case is within the jurisdiction of admiralty. In so doing it will not be necessary to enter into any extended discussion of the merits of a "locality plus" rule. It will be sufficient to adopt the following language of this Court, written in 1914

by Mr. Chief Justice Hughes, in *Atlantic Transport v. Imbrovek*, 234 U.S. 52, 62 (1914):

If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters, was quite sufficient.

The ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) recommends that Congress amend 28 U.S.C. § 1333 to state a "locality plus" rule, arguing that "The Federal courts should not be burdened with every case of an injured swimmer." *Id.* at 233. Legislative amendments are not, of course, addressed to this Court. Nor does this Court have before it a "case of an injured swimmer." *Cf. Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967); *McGuire v. City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961).²³ The present case involves the crash of an aircraft into waters which are admittedly navigable. In light of *Imbrovek*, EJA submits that the following comments by Judge Biggs in *Weinstein* and Judge Edwards in the dissenting opinion in this case properly dispose of this matter. Judge Biggs said in *Weinstein*:

Assuming *arguendo* that some kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdiction, we believe nonetheless that the cases at bar are within the admiralty jurisdiction insofar as the tort claims alleged therein are concerned. At the time the

²³ It should be noted that in *Chapman* the swimmer was injured in "approximately 18 inches of water." 385 F.2d at 963; and in *McGuire* the court deemed it "questionable" whether the waters where the swimmer was injured were in fact navigable. 192 F. Supp. at 867.

Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across the same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels. (316 F.2d at 763)

And Judge Edwards said in his dissenting opinion in this case:

Here the aircraft took off from a shorefront airport; its flight path led over navigable waters (if only for a brief distance); when disabled, it fell into navigable waters; and the damage complained of is occasioned by crashing into and sinking into navigable waters.

We cannot by any means be sure that the Supreme Court will not adhere or revert to the "locality alone" test, but in the meantime *we should note that there is some maritime character to any flight of any airplane over any navigable water.*

If, as a result of shore-based negligence in dry dock, a sea valve were left open on a deep-water vessel, would anyone doubt admiralty jurisdiction over cases arising from its subsequent sinking?

I think we should adopt the Third Circuit rule of *Weinstein, supra*.

"We hold, therefore, that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty." 316 F.2d at 766.

This would not require endorsing its "locality alone" test, but, as is obvious from what has been said, I would accept fully much of Judge Biggs' reasoning. . . . (Pet. for Cert., App. A, p. 25a, emphasis added)

It is an undeniable fact of life in 1972 that the overwhelming majority of passengers crossing the high seas and other navigable waters (such as the Great Lakes) do so in aircraft ranging from EJA's corporate jet to huge 747 aircraft carrying 350 passengers, rather than in ships. The 1970 edition of *The Federal Aviation Administration's Handbook of Aviation* states that during the calendar year 1969 approximately 148.1 million passengers enplaned on this country's certified air carrier fleet, a 5 percent gain over calendar year 1968. (Pages 57 and 58). While all of these passengers did not travel over navigable waters, some 6.3 million of them traveled by air to Europe alone. (*Id.* p. 89). In calendar year 1969 approximately 16.8 million passengers traveled by air and sea between the United States and foreign countries. Of that number 15.3 million passengers, or 90.9 per cent of all such passengers, traveled by air. (*Id.* p. 89). Considerable cargo is also carried over navigable waters in aircraft. In fact, entire airlines exist today just to fly air freight, much of it across the ocean.

If aircraft are heavily involved in such commerce, is it nonmaritime commerce just because they fly over the navigable waters instead of sailing on them? That argument has been consistently rejected since it was first proposed. *E.g., Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Calif. 1954).

"Service" and "navigation" both play extremely important roles in the course of this maritime air

commerce—perhaps more so than was ever the case with vessels. Air traffic controllers maintain separation of aircraft flying across the seas to avoid mid-air collisions, just as ships must avoid collisions at sea. Aircraft landing and taking off must be controlled and guided by others just as ships must be piloted by others through narrow straits and channels to reach their piers. Airports must be kept free of hazards to this air navigation just as ships and channels must be kept free of hazards to ship navigation. And airports like Burke Lakefront—which was actually built by filling in navigable water—have special maritime problems because of hazards caused by seagulls which roost on breakwaters, runways, taxiways and the like; and which fly inside the airport's control zone and become a hazard to safe air navigation and commerce.

EJA submits that the wrongs alleged in its complaint—that respondents failed to remove the hazards to navigation and commerce “on, over and adjacent” to the airport, and failed to provide proper services and navigational control over the aircraft by clearing it for takeoff into the seagulls—have all the relationship to the service, navigation and commerce of aircraft flying over navigable waters that could possibly be required in this case.²⁴

²⁴ As Judge Wisdom recently concluded with respect to a maritime relationship in *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 111, at note 14 (5th Cir. 1970):

Those cases which have demanded some maritime connection see note 12 *supra* have demanded only a minimum. [Note 12 cites *Smith v. Guerrant*, 290 F. Supp. 111 (S.D. Tex. 1968); *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967); *Thomson v. Chesapeake Yacht Club*, 255 F. Supp. 555 (D. Md. 1965); *McGuire v. City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961).]

CONCLUSION

For the reasons stated petitioners Executive Jet Aviation, Inc., and Executive Jet Sales, Inc. pray that the judgment of the court of appeals be reversed; that petitioners' complaint be held to be within the admiralty and maritime jurisdiction of the court; that the cause be remanded to the district court for trial; and that petitioners have all the costs of these appeals.

Respectfully submitted,

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May 1, 1972

FILE COPY

DEC 15 1972

E. ROBERT SEEVER, CLERK

the Supreme Court of the United States

SETTLED TERM 1971

No. 71-575

EXECUTIVE JET AVIATION, INC., et al.,

Plaintiffs,

CITY OF CLEVELAND, OHIO, et al.,

Respondents.

**MEMORANDUM OF DECISIONS CITY OF CLEVELAND,
OHIO AND PHILIP A. SCHWERTZ OPPOSING
CERTIORARI**

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October 15, 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-678.

EXECUTIVE JET AVIATION, INC., et al.,

Petitioners,

v.

CITY OF CLEVELAND, OHIO, et al.,

Respondents.

BRIEF OF RESPONDENTS CITY OF CLEVELAND, OHIO AND PHILLIP A. SCHWENZ OPPOSING CERTIORARI.

QUESTION PRESENTED.

Petitioners' statement of the question presented does not fairly reflect any question presented by the record in this case. The only question which would be presented if certiorari were granted herein is—

Whether the court of appeals correctly held the action not cognizable in admiralty when it found on the undisputed evidence (as did the district court) that the alleged tort did not occur on navigable waters since the impact which precipitated the accident and resulting damage to petitioners' aircraft occurred when it was struck by a large number of birds while over the runway, disabling the plane's engines and causing it to lose altitude so as to strike a pick-up truck and the airport perimeter fence before coming to rest in navigable waters.

STATEMENT OF THE CASE.

This action arises out of the crash of a jet aircraft owned by petitioner Executive Jet Sales, Inc. and operated by petitioner Executive Jet Aviation, Inc. The crash occurred on July 28, 1968 as the plane was taking off from Burke Lakefront Airport in Cleveland, Ohio, adjacent to the navigable waters of Lake Erie.

As petitioners' aircraft taxied out to the runway for take off, respondent Dicken, the air traffic controller in the airport control tower, warned the pilots by radio, "Caution, birds on end of runway." (R. 19.¹) "It looks like there are a million of them." (R. 65, 70, 71, 72.)

Ignoring that warning, the pilots commenced their take off and continued until the plane was rotated at a speed of approximately 125 knots (R. 19)—i.e., the nose was rotated upward so the plane would become airborne. At that point "a sea of birds on the runway became visible" to the pilots. (*Ibid.*)

As the plane approached the birds at an altitude of approximately 75 feet above the runway, it "caused them to flush and fly into the aircraft, apparently hundreds hitting the belly and engine intakes." (R. 19.) "*There was almost immediate total loss of power.*" (*Ibid.*) The total loss of engine power was due to extensive damage to both jet engines resulting from the bird strike and the fact that both engines were filled with bird debris, all as described in detail by McAvoy, the chief investigator of the accident for the National Transportation Safety Board. (R. 59-60.)

Upon sustaining the total power loss the plane descended in a semi-stalled attitude until it struck the top of

¹ Record references (R. ---) are to pages of the printed Appendix to the Briefs, and references (Ph. ---) are to the Appendix of Photographic Exhibits both of which were filed in the court of appeals and transmitted as the record in this Court.

a pick-up truck parked at the end of the runway and the airport perimeter fence. (R. 19, 52, 56.) The point where the aircraft struck the truck and fence is marked on Plaintiffs' Exhibit 4 (Ph. 2) and the damage to the truck and fence is shown in Plaintiffs' Exhibits 37 and 42. (*Id.* 4, 5.)

After striking the fence the plane continued on until it landed in the water. (R. 19.) The distance from the fence to the point where the plane came to rest was approximately one-fifth of a statute mile (R. 43-4), but was quite close to the edge of the land which extended beyond the end of the runway as marked by McAvoy on the map of the airport, Plaintiffs' Exhibit 4. (Ph. 2.) The plane floated approximately 5 to 10 minutes before it sank. (R. 20.) "The crew returned to the airport and there were no injuries." (*Ibid.*)

District Court Held Action Not Cognizable in Admiralty Because Tort Occurred Over Land and There Was No Maritime Nexus.

The district court in its memorandum opinion set out the pertinent facts, noting that "[t]here is no genuine issue as to any of the facts set out above." (Pet. for Cert. 31a.) Based on these facts the district court found that "it is manifest that the alleged negligence became operative upon the aircraft while it was over the land." (*Id.* at 36a.) "Whether it came down upon land or upon water was largely fortuitous." (*Id.* at 37a.) The court concluded that "the undisputed facts in this case demonstrate that the tort occurred over the land." (*Id.* at 38a.) Hence, "the tort in this case did not occur upon navigable waters and the action is not cognizable in admiralty." (*Ibid.*)

The district court also found that "the operative facts of the claim in this case are concerned with the land-

connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off. It is the Court's opinion that there exists no relationship between the 'wrong' alleged in this case and some maritime service, navigation or commerce upon navigable waters." (*Id.* at 41a.)

There being no basis for federal jurisdiction other than in admiralty, and having found the case not cognizable in admiralty, the district court dismissed the action. Thereafter petitioners refiled the case in state court where it now pends.

Court of Appeals Affirmed on Ground Tort Occurred Over Land.

The Court of Appeals for the Sixth Circuit affirmed on the sole ground that "the alleged tort occurred on land, even though the plane fell into navigable waters shortly after take off from the airport, and that no right of action is cognizable in admiralty." (Pet. for Cert. 1a.) The appellate court did not reach the question of maritime nexus, saying (*Id.* at 6a):

Since we agree with the District Court that the alleged tort in this case occurred on land before the aircraft reached Lake Erie, and since admiralty jurisdiction does not extend to torts committed on land, it is not necessary to consider the question of maritime relationship or nexus discussed by this court in *Gowdy v. U. S.*, 412 F.2d 525, 527-29 (6th Cir.), cert. denied, 396 U.S. 960, and *Chapman v. City of Gross Pointe Farms*, 385 F.2d 962, 966 (6th Cir.). See *Nacirema v. Johnson*, 396 U.S. 212, 215, n. 7; *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 58-60; *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727, 729-31 (6th Cir.).

REASONS FOR DENYING CERTIORARI.

I. In View of Undisputed Facts Showing that Tort Occurred Over Land, Judgment Below Does Not Conflict with Decisions in Other Circuits.

Petitioners contend that the judgment of the Sixth Circuit in this case is in conflict with the decision of the Third Circuit in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963).

This is simply not true. On the facts before the court in *Weinstein* the crash there occurred on the navigable waters of Boston Harbor and the tort thus had a maritime situs. This is diametrically opposite to the facts here where the tort clearly occurred over land.

To appreciate fully the basis of the *Weinstein* decision it is necessary to review briefly the background of the case as disclosed by the record on file in the Third Circuit. The matter came before the district court on exceptions of defendant Eastern Air Lines to the Libel on the grounds that (*Weinstein R.* 31a):²

The facts averred in the Libel do not constitute a cause of action against Eastern Air Lines, Inc., within the admiralty jurisdiction of this Court.

and

This Court does not have jurisdiction in admiralty against Eastern Air Lines, Inc., by reason of the allegations that the place of the crash was within the territorial waters of the Commonwealth of Massachusetts.

It is thus apparent that the *only* facts before the district court and the court of appeals in *Weinstein* were the

² References to the printed appendix in the *Weinstein* case on file in the United States Court of Appeals for the Third Circuit will be designated as (*Weinstein R.* --- a).

allegations of the Libel. Paragraph 9 of the Libel alleged (Weinstein R. 5a):

Shortly after the said aircraft had become airborne, following take-off from the said airport, by reason of the negligence of the respondents, and each of them, and by virtue of their respective breach of warranties said aircraft crashed into the navigable waters of Boston Harbor, causing libellant's decedent to suffer severe and disabling injuries resulting in his death.

Eastern admitted in its answer "that said aircraft crashed into an inlet or body of water on or about the date averred and that libellant's decedent was killed." (Weinstein R. 25a.)

The district court had before it only the allegation, admitted by Eastern, that the aircraft had crashed into the navigable waters of Boston Harbor causing decedent's death. Consequently court and counsel accepted the fact that the situs of the tort was on navigable waters and the only question presented for a decision by the district court was whether that fact alone was sufficient to confer admiralty jurisdiction on the court or whether it was also necessary to find a maritime nexus as a basis for admiralty jurisdiction.

The district court, after a careful review of the authorities, concluded that not only a maritime locality but "some maritime connection is necessary for admiralty jurisdiction." *Weinstein v. Eastern Airlines, Inc.*, 203 F. Supp. 430, 433 (E.D. Pa. 1962). Since the district court found no maritime nexus it sustained Eastern's exceptions and dismissed the Libel.

The Court of Appeals for the Third Circuit took a different view, however, and reversed the decision of the district court because (316 F.2d at 761):

The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty

jurisdiction is the situs of the tort; i.e., the place where it happened. *If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required.*

Petitioners contend that the actual facts in the Boston Harbor crash were similar to those in the present case and hence a conflict exists. Whether that is true or not is beside the point. The fact is that neither the district court nor the court of appeals in *Weinstein* had any facts of record other than the admitted allegation that after take off the plane crashed into the navigable waters of Boston Harbor—thus the location of the tort was maritime.

There is admittedly a conflict between the Third and Sixth Circuits as to the requirement of a maritime nexus. In *Weinstein* the Third Circuit held that a maritime location alone is sufficient to establish admiralty jurisdiction. “[N]othing more is required.” (*Ibid.*) The Sixth Circuit, however, has held in other cases that in addition to a maritime situs there must be a maritime nexus; i.e., “A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters.”³

It may well be that this conflict is one which should be resolved by this Court. But it is clear that *this case* does *not* present a record on which the conflict can be decided. Thus—

If the tort here had occurred on navigable waters—
(Which it did not as both the district court and
the court of appeals found on the undisputed
facts)

³ *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962, 966 (6th Cir. 1967); *Gowdy v. United States*, 412 F.2d 525 (6th Cir. 1969), cert. denied, 396 U.S. 960 (1969).

And if the court of appeals had held the case not cognizable in admiralty because of the lack of any maritime nexus—

(Which it did *not* since the court did not even reach that question because of its finding that the tort occurred on land)

then surely the case would present a suitable vehicle on which this Court might resolve the conflict thus presented between the Third and Sixth Circuits if it wished to do so.

But that is not the case before the Court. The judgment of the Sixth Circuit here does *not* conflict with *Weinstein* or any other court of appeals decision.

Petitioners have cited a number of cases of aircraft crashes in navigable waters wherein the courts held them cognizable in admiralty, and have suggested to the Court that a conflict exists between such decisions and the results below.⁴ Examination of these decisions, however, will disclose that in each case the tort occurred on or over navigable waters.

The cases cited by petitioners fall into two categories. First are those cases in which the court has adopted the "locality alone" test and held admiralty jurisdiction to rest on the sole fact that the tort occurred on navigable waters—not true in this case. Second are those cases arising under the Death on the High Seas Act (46 U.S.C. § 761) which by its very nature is not applicable in this case.

Petitioners contend that the decision of the Sixth Circuit in this case stands alone.⁵ Quite the contrary—

⁴ Pet. for Cert. 22-3.

⁵ Pet. for Cert. 23.

II. Judgment Below Is in Accordance with Settled Law as Announced by this Court.

It has long been held an essential requisite of admiralty jurisdiction that the tort occur on navigable waters. If the situs of the tort is on land there can be no admiralty jurisdiction. *Smith & Son v. Taylor*, 276 U.S. 179 (1928).

The essence of petitioners' contention here is that since their aircraft came to rest in navigable waters where the principal damage to the plane occurred, the location of the tort is maritime. However, that contention is completely refuted by this Court's decision in *Smith & Son v. Taylor*, 276 U.S. 179 (1928), where a longshoreman standing on the wharf (deemed to be an extension of land) was struck by a cargo sling and knocked into the water where he was later found dead. The issue before this Court was whether the rights of the parties were controlled by maritime law or state law. The contention of the plaintiff in error was summarized by the Court (*Id.* at 182):

It argues that as no claim was made for injuries sustained while deceased was on land and as the suit was solely for death that occurred in the river, the case is exclusively within the admiralty jurisdiction.

Note that this is the very argument petitioners advance in the case at bar. They say that the suit is solely for the destruction of their aircraft which did not occur until it sank in navigable waters and hence the case is one in admiralty. This Court rejected that contention, however, pointing out that "this is a partial view that cannot be sustained." (*Ibid.*) The Court continued (*Ibid.*):

The blow by the sling was what gave rise to the cause of action. *It was given and took effect while deceased was upon the land.* It was the sole, immediate and proximate cause of his death. *The G. R. Booth*, 171

U.S. 450, 460. *The substance and consummation of the occurrence which gave rise to the cause of action took place on land.*

In the present case it could likewise be said that the impact of the birds on the plane and its engines was "what gave rise to the cause of action." That event "took effect while [the plane] was upon the land. It was the sole, immediate and proximate cause of [the crash]. . . . The substance and consummation of the occurrence which gave rise to the cause of action took place on land." (*Ibid.*)

The converse of *Smith & Son* came before the Court in *Minnie v. Port Huron Co.*, 295 U.S. 647 (1935), where a longshoreman working on the deck of a vessel was struck by a swinging hoist and knocked onto the wharf. Observing that, "We had the converse case before us in *Smith & Son* . . ." (*Id.* at 648), the Court held the case cognizable in admiralty, because (*Id.* at 649):

If, when the blow from a swinging crane knocks a longshoreman from the dock into the water, the cause of action arises on the land, it must follow, upon the same reasoning, that when he is struck upon the vessel and the blow throws him upon the dock the cause of action arises on the vessel.

Similarly, in *The Admiral Peoples*, 295 U.S. 649 (1935), a passenger fell from the ship's gangplank onto the wharf and was injured, it being alleged that the fall was caused by negligent construction or placing of the gangplank. This Court held that since the gangplank was part of the ship and the cause of action originated and the injury had commenced on the gangplank, the cause of action was in admiralty.

The court of appeals cited and relied on *Smith & Son*, *Minnie* and *Admiral Peoples* in deciding that the alleged tort here arose on land. In addition, Chief Judge Phillips,

speaking for the court, and Judge McCree in his concurring opinion cited and relied, as did the district court, on *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir. 1965), *cert. denied*, 382 U.S. 812 (1965). In *Wiper* plaintiff's decedent was alleged to have fallen from a dock and drowned as the result of defendant's negligence in maintaining the dock. Holding that the tort was completed on land, the court observed that (*Id.* at 730):

[T]he negligently maintained dock which presumably caused the decedent to fall was land, and the decedent was on land at the time he was caused to fall. Thus, the tort was complete before decedent ever touched the water and this being true, the subsequent drowning is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages.

In the present case the plane was over land when it was struck by the birds and caused to fall. The tort was thus complete before the plane ever touched the water. Its subsequent immersion "is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages." (*Ibid.*)

Judge McCree summed up the matter most succinctly in his concurring opinion, saying (Pet. for Cert. 7a):

The rule, as I understand it, is that the situs of the tort is where the negligence becomes operative, not where the damages, or the major portion of them, are sustained. Applied here, this rule requires affirmance of Judge Kalbfleisch's careful opinion. The plane hit the gulls over land; and there, under our rule, is where the tort occurred.

We submit that the logic of this view is irrefutable, and accordingly—

III. Court of Appeals and District Court Correctly Held Case Not Cognizable in Admiralty.

Petitioners argue that the decision below was erroneous. They say the court of appeals should not have followed *Smith & Son*, *Minnie* and *Admiral Peoples* because the present case involves an airplane crash⁶—as though that were sufficient ground for ignoring the rulings of this Court. Petitioners contend that “the Sixth Circuit has fashioned a totally unworkable rule for future aircraft cases.”⁷

On the contrary, the rule adopted by the court below is the only sensible way to deal with cases of this kind. Indeed, the approach urged by petitioners was sharply criticized by the American Law Institute, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* (1969),⁸ saying (*Id.* at 231):

If a plane takes off from Boston's Logan Airport bound for Philadelphia, and crashes on takeoff, it makes little sense that the next of kin of the passengers killed should be left to their usual remedies, ordinarily in state court, if the plane crashes on land, but that they have access to a federal court, and the distinctive substantive law of admiralty applies, if the wrecked plane ends up in the waters of Boston Harbor. This result has been found to follow, however, from the rule that locality alone is enough to give jurisdiction in admiralty. *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963).

⁶ Pet. for Cert. 24.

⁷ *Id.* at 25.

⁸ In addition to a distinguished group of reporters and consultants, the advisory committee for the study included four United States Courts of Appeals judges—Judge Henry J. Friendly of the Second Circuit, Judge Albert B. Maris (Ret.) of the Third Circuit, Judge John Minor Wisdom of the Fifth Circuit and Judge Charles Merton Merrill of the Ninth Circuit.

Proposing an amendment to Judicial Code § 1333 which would require a maritime nexus as a requisite for admiralty jurisdiction, the Institute expressed the following conclusion (*Id.* at 233):

Though the Reporters believed that the Supreme Court would hold that locality alone is not sufficient for admiralty jurisdiction, they thought that *the matter should be settled by statute. It is hard to think of any reason why access to federal court should be allowed without regard to amount in controversy or citizenship of the parties merely because of the fortuity that a tort occurred on navigable waters, rather than on other waters or on land. . . .* [The amendment] is intended to ensure that result, and to require that *some relationship be found between the wrong and some maritime service or navigation or commerce on navigable waters.*

Petitioners also suggest that the decision below is erroneous because the application of general federal maritime law in cases such as this would insure uniformity of decisions and uniformity of results.⁹ This contention squarely conflicts with the express policy of Congress that the federal interest lies in the orderly and uniform regulation of *all* air commerce under the Federal Aviation Act of 1958 (49 U.S.C. §§ 1301-1542) and by the rules and regulations of the Civil Aeronautics Board and the Federal Aviation Administration made pursuant to that Act. Indeed, § 1509(a) of the Act specifically provides that laws of the United States relating to navigation and shipping, including the rules for prevention of collisions, shall not apply to aircraft, except as to international rules relating to navigation on the high seas as set forth in 33 U.S.C. §§ 143-147d. That exception is inapplicable here since 33 U.S.C. § 143 specifically provides that "Sections 144-147d

⁹ Pet. for Cert. 21.

of this title shall not apply . . . to the Great Lakes of North America and their connecting and tributary waters . . . nor, with respect to aircraft, to any territorial waters of the United States."

If, as petitioners suggest, it is desirable to have a uniform law applicable to aircraft accidents, such a law should be enacted by Congress. It should apply to *all* aircraft accidents whether on land or sea. The piecemeal solution to the problem proposed by petitioners is neither desirable nor workable.

CONCLUSION.

The court of appeals correctly held that "the alleged tort occurred on land, even though the plane fell into navigable waters shortly after take off from the airport, and that no right of action is cognizable in admiralty." (Pet. for Cert. 1a.) That decision is in accordance with well settled law announced by this Court.

The decision below does not conflict with *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963). The court of appeals in the present case specifically noted (Pet. for Cert. 6a):

As we read that [*Weinstein*] decision, the test for admiralty jurisdiction over torts stated at 316 F.2d at 761 produces the same result we have reached when applied to the facts of the present case. The Court said:

"The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; i.e., the place where it happened." *Id.* at 761.

In *Weinstein* the tort took place on the navigable waters of Boston Harbor. Here the alleged tort occurred over land. The different results are based on different facts.

The present case does not afford a vehicle for deciding the question whether a maritime nexus (in addition to a maritime location) is necessary for admiralty jurisdiction.

The petition for certiorari presents no substantial question for resolution by this Court.

The writ should be denied.

Respectfully submitted,

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December 15, 1971.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-678

EXECUTIVE JET AVIATION, INC., ET AL., PETITIONERS

v.

CITY OF CLEVELAND, OHIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT HOWARD E. DICKEN

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 448 F. 2d 151. The opinion of the district court (Pet. App. 27a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1971. The petition for a writ of certiorari was filed on November 19, 1971, and was granted on February 22, 1972 (405 U.S. 915). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioners' jet aircraft struck, and its engines ingested, a large number of birds over the runway during takeoff. The resulting loss of power caused the aircraft to lose altitude, first striking the airport perimeter fence and a pick-up truck, then coming to rest and sinking in the navigable waters of Lake Erie. The question presented is whether petitioners' claim for property damage to the aircraft, allegedly caused by respondents' failure to warn petitioners' pilots of the bird hazard on the runway, lies within admiralty jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides in pertinent part:

Section 2. The judicial Power shall extend
* * * to all Cases of admiralty and maritime
Jurisdiction; * * *.

Title 28 of the United States Code provides in pertinent part:

§ 1333. *Admiralty, maritime and prize cases*

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * * * *

STATEMENT

There is no dispute about the facts material to the issue before the Court. Petitioners are engaged in the business of flying contract and charter flights and of

owning, selling and leasing jet aircraft (App. 16). This action arises out of the crash of petitioners' aircraft during take-off from a runway at Burke Lakefront Airport in Cleveland, Ohio, adjacent to Lake Erie (App. 2-3, 13).

When the crash occurred, petitioners' aircraft, manned by a pilot, co-pilot and hostess, was taking off on a flight to White Plains, New York, by way of Portland, Maine (App. 13). Petitioners' aircraft was cleared for takeoff on Runway 6L by respondent Dicken, the federal air traffic controller at the airport. In giving the takeoff instructions, Dicken warned the pilots, "Caution, bird *on end of runway*." (App. 14). He added, "It looks like a million of them" (App. 36).¹

The aircraft then executed its takeoff and became airborne about midway down the runway (App. 13-14, 36-38). The takeoff flushed the seagulls on the runway and they rose into the airspace above the runway and directly in front of the approaching airborne aircraft (App. 14, 36-38). The aircraft, by this time flying approximately 100 feet above the runway, collided with a large number of seagulls, many hitting its engine intakes and belly (App. 14, 25-27, 36-38). "There was almost immediate total loss of power," (App. 14) caused by the ingestion of birds into the aircraft's jet engines. Subsequent examination of the port engine showed that "[t]he guide veins were bent

¹ These warnings, suggestive of contributory negligence and assumption of risk by petitioners' pilots, appear to have led petitioners to invoke admiralty jurisdiction where respondent would be denied these defenses. Affidavit of Phillip D. Bostwick in Compliance with Rule 2(A)(6), p. 10 n. 1 (Joint Appendix in the United States Court of Appeals for the Sixth Circuit, 21).

to various angles, * * * [t]he first stage compressor rotator blades were bent, * * * [t]he first stage stator blades, and second stage rotor blades were bent and torn, * * * [t]he compressor area of the jet engine was filled with bird debris, * * * the fan rotor secondary air files were missing [or] * * * bent and ripped, [and] [t]he exit guide veins leading edges had bends and tears" (App. 26). The starboard engine suffered similar damage (App. 26-27).

As a result of the impact and total loss of the aircraft's power, there was a substantial reduction in its air speed (App. 14). Settling back down to the runway, the aircraft veered slightly to the left, struck a portion of the airport perimeter fence and the top of a pickup truck parked adjacent to the fence, and came to rest in Lake Erie less than one-fifth of a statute mile off shore (App. 14, 20-24, 36-38). While there were no injuries to the crew, the aircraft sank and became a total loss (App. 4, 15).

Invoking admiralty jurisdiction, petitioners brought this action for the value of their aircraft against the City of Cleveland, Ohio, as the owner and operator of Burke Lakefront Airport, Phillip A. Schwenz, the airport manager, and Dicken, a Federal Aviation Administration ("FAA") air traffic controller on duty at the airport when the crash occurred (App. 2-4). The district court held that the case was not cognizable in admiralty and dismissed the complaint for lack of jurisdiction over the subject matter² (Pet. App. 27a-42a).

² The court's action did not deprive the petitioners of their only possible remedy for respondent's alleged negligence since

The district court applied a twofold test of admiralty jurisdiction over maritime torts adopted by the Sixth Circuit in *Chapman v. City of Grosse Pointe Farms*, 385 F. 2d 962. By that test, not only must "the locality where 'the substance and consummation of the occurrence which gave rise to the cause of action took place * * *' or * * * 'the place where the negligent act or omission *becomes operative or effective* upon the plaintiff * * *'" be navigable waters (*id.* at 964), but also "[a] relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters" (*id.* at 966).

The district court found that the allegations of the libel satisfied neither of these criteria. With respect to the locality of the tort, the court noted that not only did the negligence (with respect to respondent Dickens's alleged failure to warn of the bird hazard) occur on land, but also "the alleged negligence became operative upon the aircraft while it was over land * * * when the gulls disabled the plane's engines" (Pet. App. 36a-37a). "From this point on," the court concluded, "the plane was disabled and was caused to fall. Whether it came down upon land or upon water was largely fortuitous" (Pet. App. 37a).

Alternatively the court concluded that the wrong bore no relationship to maritime service (Pet. App. 40a-41a):

Assuming * * * that air commerce bears some relationship to maritime commerce when the former is carried out over navigable waters, the

they have also filed a civil action against the United States in the district court under the Tort Claims Act, 28 U.S.C. 2674, asserting the same claim (Pet. Br. 7, n. 4).

relevant circumstances here were unconnected with the maritime facets of air commerce. The claimed "wrong" in this case was the alleged failure to keep the runway free of birds and the failure to adequately warn the pilots of their presence upon the end of the runway. When the alleged negligence occurred, and when it became operative upon the aircraft, all the parties were engaged in functions common to all air commerce, whether over land or over sea.

* * * * *

Thus, the conclusion here must be that the operative facts of the claim in this case are concerned with the land-connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off.

The court of appeals (one judge dissenting) affirmed on the ground that "the alleged tort * * * occurred on land before the aircraft reached Lake Erie * * *" (Pet. App. 6a). The dissenting judge, concluding that the holding of the majority conflicted with *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758 (C.A. 3), certiorari denied, 375 U.S. 940, argued that "tort cases arising out of aircraft crashes into navigable waters are cognizable in admiralty jurisdiction even if the negligent conduct is alleged to have happened wholly on land" (Pet. App. 11a, 24a).

ARGUMENT

INTRODUCTION AND SUMMARY

1. In 1850, despite the numerous cases stating that admiralty's jurisdiction over torts depended on the

locality of the wrong, Mr. Benedict expressed his "celebrated doubt"¹ as to whether such jurisdiction did not depend, in addition to a maritime locality, upon some "relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels to which admiralty jurisdiction, in cases of contracts, applies." Benedict, *The Law of American Admiralty*, p. 173 (1850).

In 1914, when this Court last considered the matter, it left the question open, finding its resolution unnecessary for the disposition of the case. *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52.

The doubt remains today, although in 1969 the Reporter of the American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts* ("ALI Study") concluded (p. 233) that "the Supreme Court would hold that locality alone is not sufficient for admiralty jurisdiction."

The Court must either resolve Mr. Benedict's "celebrated doubt" or, like the court of appeals, affirm on the narrower ground that, since the tort had no maritime locality, the suit will not lie in any event, and there is no necessity to decide whether or not a "maritime nexus" is an added requirement.

We urge the former course because we believe that it will enable this Court to fashion criteria for the resolution of cases involving crashes of aircraft into navigable waters which are more logical and coherent than a test of admiralty jurisdiction which depends

¹ Hough, *Admiralty Jurisdiction—Of Late Years*, 37 Harv. L. Rev. 529, 531 (1924).

exclusively upon the fortuity of where the aircraft falls.

In aviation cases a "locality alone" test of admiralty tort jurisdiction at best provides results based on happenstance and may even lack the compensating virtue of predictability. Given the speed and altitude at which contemporary aircraft travel and the often cataclysmic consequences of a malfunction, whether a disabled aircraft falls on navigable water or land is entirely a matter of chance. Substantive and procedural rights and remedies should not be allocated on such a random basis.

Moreover, the "locality alone" test of admiralty tort jurisdiction may not even provide a predictable guide in aircraft cases. Fortunately in this case it is known that the facts giving rise to a cause of action for property damage—the damage to the aircraft's engines caused by the gulls—occurred over land. Conversely, in all decided aircraft cases brought in admiralty, except *Weinstein, supra*, and other cases involving the same accident, the alleged torts have had plainly maritime localities in that the alleged negligence became operative or effective while the aircraft was over navigable waters. In future cases, however, questions over when and where the alleged negligence took effect and gave rise to a cause of action may lessen the predictability of results, if a locality test exclusively is controlling.

In addition, such a test of admiralty jurisdiction would allow state law to be displaced by federal maritime law in cases in which the state has a para-

mount interest, and there is no competing need for uniformity.

A test of admiralty jurisdiction in aircraft cases which requires a maritime nexus, on the other hand, would rationally relate the cases heard in admiralty to the ordinary business of admiralty courts: cases involving maritime service and commerce. Such a test would allocate to admiralty those accidents, occurring on navigable waters, which involved aircraft performing functions traditionally performed by the shipping industry, such as transoceanic or cross-lake transportation and shipping.

2. Alternatively and more narrowly, we urge that this Court may affirm on the ground stated by the court of appeals: that "the alleged tort * * * occurred on land before the aircraft reached Lake Erie * * *" (Pet. App. 6a).

I

PETITIONERS' CLAIMS ARE NOT WITHIN ADMIRALTY JURISDICTION BECAUSE THE AIRCRAFT'S ACTIVITY BORE NO RELATION TO MARITIME COMMERCE OR NAVIGATION

A. ADMIRALTY TORT JURISDICTION REQUIRES THAT THE ACTIVITY GIVING RISE TO THE TORT BE RELATED TO MARITIME COMMERCE OR NAVIGATION

Despite the broad language of some cases (cf. *The Plymouth*, 3 Wall. 20, 36), this Court has never held that a maritime locality was a sufficient condition of admiralty tort jurisdiction. ALI Study p. 232; see

Gilmore and Black, *The Law of Admiralty*, 22, n. 78 (1957); cf. 7A Moore, *Federal Practice, Admiralty*, ¶325(3).

The last time this Court considered whether, in addition to a maritime locality, the tort must bear some relation to maritime commerce or navigation in order to be cognizable in admiralty, the Court left the matter open. *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52. This was a libel brought by a stevedore for injuries sustained on board a vessel while loading and stowing copper. The Court sustained admiralty jurisdiction, but found that it did not have to decide whether a maritime locality alone was sufficient for jurisdiction, since (234 U.S. at 61, 62):

Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction. * * *

If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient. * * *

* The suggestion in *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758, 763 (C.A. 3) that *Imbrovek* rejected the requirement of a maritime relation is inaccurate. The view that the Court found "altogether too narrow" was that, in order for a tort to be "maritime," it must arise out of an injury to a ship caused by the negligence of a ship or a person or out of injury to a person

While the question has yet to be authoritatively resolved by this Court, decisions of this and lower courts support the proposition that a "maritime relation" is a "condition *sub silentio* to admiralty jurisdiction" (*Chapman v. City of Grosse Point Farms*, 385 F. 2d 962, 966 (C.A. 6)). In all of the cases in this Court, and most of the cases in lower courts, where admiralty's jurisdiction over a tort has been sustained, the tort has had, in addition to a maritime locality, a significant relation to maritime service.

In sustaining libels *in rem* against vessels for damage to pile-supported beacons, the Court considered the relation to maritime navigation of the beacons with which the vessels had collided. *The Blackheath*, 195 U.S. 361, 367; *The Raithmoor*, 241 U.S. 166, 176-177.⁵ In other tort cases, this Court similarly has

by the negligence of a ship * * * (234 U.S. at 61; emphasis added). On this issue the Court concluded (*ibid*):

The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character.

⁵ In *The Blackheath*, the beacon had been completed when damaged. In *The Raithmoor*, where it was the uncompleted structure upon which the beacon was to rest that was damaged, Justice Hughes stated:

We regard the location and purpose of the structure as controlling from the time the structure was begun. It was not being built on shore and awaiting the assumption of a maritime relation. It was in course of construction in navigable waters, that is, at a place where the jurisdiction of admiralty in cases of tort normally attached,—at least in all cases where the wrong was of a maritime character. * * * The relation of the structure to the land was of the most technical sort, merely through the attachment to the bottom; it had no connection, either actual or anticipated, with commerce on

discussed the maritime or non-maritime nature of the tort. See, *e.g.*, *Atlantic Transport Co. v. Imbrovek*, *supra*; *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372, 382; *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 475-478; *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479, 481; *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 457; *London Guarantee & Accident Co. v. Industrial Accident Commission*, 279 U.S. 109, 123.

Lower courts have repeatedly, but not uniformly,* applied a maritime relation test to exclude from admiralty jurisdiction torts deemed unconnected with maritime commerce or navigation. In *McGuire v. City of New York*, 192 F. Supp. 866 (S.D. N.Y.), the court dismissed for lack of jurisdiction, a libel for injury caused by contact with a submerged object at a public bathing beach. The court stated (192 F. Supp. at 871-872):

The proper scope of jurisdiction should include all matters relating to the business of the sea and the business conducted on navigable waters.

The libel in this case does not relate to any tort which grows out of navigation. It alleges

land. * * * This is not the case of a structure which at any time was identified with the shore, but from the beginning of construction locality and design gave it a distinctively maritime relation. * * *

* Examples of cases sustaining admiralty jurisdiction over torts having a maritime location, but no relation to maritime service, are *King v. Testerman*, 214 F. Supp. 335 (E.D. Tenn.) (injuries to a water skier) and *Davis v. City of Jacksonville Beach, Florida*, 251 F. Supp. 327 (M.D. Fla.) (injury to a swimmer by a surfboard).

an ordinary tort, no different in substance because the injury occurred in shallow waters along the shore than if the injury had occurred on the sandy beach above the water line. Whether the City of New York should be held liable for the injury suffered by libellant is a question which can easily be determined in the courts of the locality. To endeavor to project such an action into the federal courts on the ground of admiralty jurisdiction is to misinterpret the nature of admiralty jurisdiction.

The Fifth and Sixth Circuits have recently affirmed the dismissal of libels for failure to show a significant relationship between the alleged wrong and maritime activity. *Peytavin v. Government Employees Insurance Co.*, 453 F. 2d 1121 (C.A. 5); *Chapman v. City of Grosse Point Farms*, *supra*. Other cases holding that admiralty jurisdiction was not properly invoked because the torts, while having a maritime locality, lacked a significant relationship to maritime navigation and commerce, include *Hastings v. Mann*, 226 F. Supp. 962, 964-965 (E.D. N.C.), affirmed, 340 F. 2d 910 (C.A. 4), certiorari denied, 380 U.S. 963 (injury sustained while launching outboard motorboat from ramp extending into navigable water); *Smith v. Guarrant*, 290 F. Supp. 111, 113-114 (S.D. Texas) (water damage to forklift which was dropped into harbor waters by a land based crane). See also, *Weinstein v. Eastern Airlines, Inc.*, 203 F. Supp. 430, 433 (E.D. Pa.), reversed, 316 F. 2d 758 (C.A. 3), certiorari denied, 375 U.S. 940; *Thomson v. Chesapeake Yacht Club, Inc.*, 255 F. Supp. 555, 557-558 (D. Md.); *Gowdy v. United States*, 412 F. 2d 525, 527-529 (C.A.

6), certiorari denied, 396 U.S. 960; *Szumski v. Dale Boat Yards*, 48 N.J. 401, 226 A. 2d 11, certiorari denied, 387 U.S. 944. Like this Court (*supra*, pp. 11-12), lower courts have frequently bolstered their finding of admiralty jurisdiction by reference to the relation of the wrong to maritime activities.⁷

"[A]n even more damaging indictment" of the concept of admiralty tort jurisdiction based exclusively on locality "is found in the number of times courts and the legislature have had to create exceptions to that doctrine in order to effectuate just results." 7A Moore, *Federal Practice, Admiralty*, ¶325[4]. These exceptions reflect a legislative and judicial recognition that locality alone is not a sufficient criterion of admiralty tort jurisdiction. Not surprisingly the extensions have all been justified in terms of the relation of the wrong to maritime service, commerce and navigation.

The right to maintenance and cure extends to a seaman's injuries occurring on land while in the service of his ship. In *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, the Court sustained the appli-

⁷ See, e.g., *The Poznan*, 276 Fed. 418, 433-434 (S.D.N.Y.); *Sidney Blumenthal & Co. v. United States*, 30 F. 2d 247, 249 (C.A. 2); *United States v. Matson Navigation Co.*, 201 F. 2d 610, 613-615 (C.A. 9); *Weinstein v. Eastern Airlines, Inc.*, *supra*, 316 F. 2d at 763; *O'Connor & Co. v. City of Pascagoula, Mississippi*, 304 F. Supp. 681, 683 (S.D. Miss.); *State of California v. S. S. Bournemouth*, 307 F. Supp. 922, 925 (C.D. Calif.); *Watz v. Zapata Off-Shore Co.*, 431 F. 2d 100, 110-111 (C.A. 5).

cation of the Jones Act^{*} to injuries to a seaman on land by the following analogy to maintenance and cure (318 U.S. at 41-42):

[T]he maritime law, as recognized in the federal courts, has not in general allowed recovery for personal injuries occurring on land. But there is an important exception to this generalization in the case of maintenance and cure. From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land. * * * *

The doctrine of unseaworthiness, by which a seaman or a longshoreman may recover from a ship

^{*} Act of June 5, 1920, Ch. 250 § 33, 41 Stat. 1007, 46 U.S.C. § 688. In pertinent part the Act gives "[a]ny seaman who shall suffer personal injury in the course of his employment" a cause of action in tort enforceable, at his election, in admiralty or at law with a right to trial by jury. See *Panama Railroad Co. v. Johnson*, 264 U.S. 375; *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1.

^{*} After citing ancient and contemporary authorities for this conclusion, the Court stated (318 U.S. at 42):

Some of the grounds for recovery of maintenance and cure would, in modern terminology, be classified as torts. But the seaman's right was firmly established in the maritime law long before recognition of the distinction between tort and contract. In its origin, maintenance and cure must be taken as an incident to the status of the seaman in the employment of his ship. * * *. That status has from the beginning been peculiarly within the province of the maritime law * * *.

Despite this suggestion of an origin in contract, in many instances the right is more accurately classified as part of the tort compensation available to a seaman injured by the negligence or deficiencies of his ship or its crew.

owner for personal injuries caused by defects in the ship or its gear, is another area in which admiralty has abandoned the locality limitation in admiralty jurisdiction. In *Strika v. Netherlands Ministry of Traffic*, 185 F. 2d 555 (C.A. 2), an action based on unseaworthiness brought by a longshoreman injured on shore, the court rejected the argument that breach of the obligation to furnish a seaworthy ship, if occurring on land, was not cognizable in admiralty. The court held that "such a tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land" (185 F. 2d at 558). *Strika* was expressly approved in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 214-215.¹⁰

A final significant extension of admiralty jurisdiction predicated upon the relation of the wrong to maritime activities is the Extension of Admiralty Jurisdiction Act,¹¹ which provides:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

* * * * *

¹⁰ Recently, in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, this Court held not cognizable in admiralty a suit by a longshoreman injured on the dock by an alleged defect in his stevedore employer's pier-based forklift truck. Thus, the shoreward extension of the unseaworthiness doctrine, insofar as longshoremen are concerned, has been limited to injuries caused by defective equipment that is part of the vessel's usual gear or which was stored on board. 404 U.S. at 213.

¹¹ Act of June 19, 1948, Ch. 526, 62 Stat. 469, 46 U.S.C. 740.

This Act was passed specifically to overrule cases, such as *The Plymouth*, 3 Wall. 20, holding that admiralty provides no remedy for damage done by ships on navigable waters to land structures. *Victory Carriers, Inc. v. Iaw, supra*, 404 U.S. at 209. Under the Act, a case is within admiralty jurisdiction if "the ship-owner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act." *Gutierrez v. Waterman Steamship Corp., supra*, 373 U.S. at 210.

The foregoing authorities illustrate that both the courts and Congress, in resolving the tort jurisdiction of admiralty over a particular occurrence or class of occurrences, have looked to the subject matter of the tort in order to define jurisdiction consonant with the history and purposes of admiralty. Cases involving aircraft accidents on or over navigable waters, to which we now turn, provide another occasion where, in determining the jurisdiction of admiralty, a resort to the maritime relation of the tort is warranted.¹²

¹² Since as early as 1850, commentators have been critical of the "strict locality" rule and have considered locality insufficient for conferral of maritime tort jurisdiction. See, e.g., Benedict, *The Law of American Admiralty* 173 (1850) (retained in § 127 of the 6th ed. (1940)); Gilmore & Black, *The Law of Admiralty* 22 (1957); 7A Moore, *Federal Practice, Admiralty*, ¶ 325[5] (2d ed. 1970); American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 229-234 (1969); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 264 (1950); Brown, *Jurisdiction of the Admiralty in Cases of Tort*, 9 Colum. L. Rev. 1, 8-9 (1909); Hough, *Admiralty Jurisdiction—Of Late Years*, 37 Harv. L. Rev. 529, 531-533 (1924); Robinson, *Tort Jurisdiction in American Admiralty*, 84 U. Pa.

B. WITH THE EXCEPTION OF *WEINSTEIN*, AND OTHER CASES INVOLVING THE ACCIDENT THERE INVOLVED, THE AIRCRAFT CASES IN WHICH ADMIRALTY JURISDICTION HAS BEEN UPHOLD HAVE SATISFIED BOTH THE CRITERIA OF MARITIME LOCALITY AND MARITIME RELATION

While there are numerous cases sustaining admiralty's tort jurisdiction over crashes of aircraft into navigable waters, analysis of those cases shows that—with the exception of the cases arising from the Boston Harbor crash¹³—each involved a tort which, in addition to a maritime locality, had a significant relation to maritime commerce. Thus, these cases further support our contention that the presence of a "maritime relation" is a requirement of admiralty jurisdiction.

The development of admiralty jurisdiction over aircraft crashes into navigable waters indicates that such jurisdiction was initially doubted, but came to be recognized in a context where its absence would have left the victim without remedy.

In the early aircraft cases brought in admiralty, most of which turned on the characterization of an aircraft as a maritime vessel, courts were reluctant to find admiralty jurisdiction. In one of the first significant cases, *The Crawford Bros. No. 2*, 215 Fed. 269, 271 (W.D. Wash.), in which a libel *in rem* for

L. Rev. 716, 734 (1936); Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 Colum. L. Rev. 1084, 1091-1092 (1964); Note, *Admiralty Jurisdiction Over Torts*, 25 Harv. L. Rev. 381, 382 (1912); Note, *Admiralty Jurisdiction of Torts*, 18 Harv. L. Rev. 299 (1905).

¹³ See note 21, *infra*, p. 27.

repairs was brought against an airplane which had crashed into Puget Sound, the court stated:

In view of the novelty and complexity of the questions that must necessarily arise out of this new engine of transportation and commerce, it appears to the court that, in the absence of legislation conferring jurisdiction, none would obtain in this court, and that questions such as those raised by the libelant must be relegated to the common law courts, courts of general jurisdiction.

* * * * *

*** [L]egislation is necessary for the regulation of air craft. They are neither of the land nor sea, and, not being of the sea or restricted in their activities to navigable waters, they are not maritime.¹⁴

The *Crawford Bros.* was followed by a number of cases dealing with seaplanes, in which admiralty jurisdiction was generally restricted to claims arising out of occurrences involving seaplanes that were afloat on navigable waters.¹⁵

¹⁴ See, also, *United States v. One Waco Bi-Plane*, 1933 U.S. Av. 159 (D. Ariz.) (libel *in rem* for repairs to airplane held not cognizable in admiralty because airplanes not the subject of maritime jurisdiction), reversed (without mention of this point) *sub nom. United States v. Batre*, 69 F. 2d 673 (C.A. 9).

¹⁵ See, e.g., *Matter of Reinhardt v. Newport Flying Service Corp.*, 232 N.Y. 115, 117-118, 133 N.E. 371 (workmen's compensation claim for injuries sustained in preventing moored seaplane from drifting onto beach dismissed because cognizable in admiralty); *United States v. Northwest Air Service, Inc.*, 80 F. 2d 804, 805 (C.A. 9) (libel *in rem* for repairs made to seaplane while on land dismissed because not cognizable in admiralty); *Dollins v. Pan-American Grace Airways, Inc.*, 27 F. Supp. 487, 488-489 (S.D.N.Y.) (seaplane held not a vessel within limitation of

More recently, the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. 761, *et seq.*, has led admiralty courts to take jurisdiction in cases of aircraft crashes at sea, where failure to do so would leave the decedent's family without a remedy.¹⁶ Prior to this Court's recent decision

liability statutes in wrongful death action arising out of crash on high seas); *Noakes v. Imperial Airways, Ltd.*, 29 F. Supp. 412, 413. (S.D.N.Y.) (same); *Lambros Seaplane Base v. The Batory*, 215 F. 2d 228, 231 (C.A. 2) (downed seaplane held a vessel subject to maritime salvage and salvor's lien). Contra, *Wendorff v. Missouri State Life Insurance Co.*, 318 Mo. 363, 372, 1 S.W. 2d 99, 103 (seaplane capsized by wave causing death held aerial navigation device for purposes of life insurance exclusionary clause).

¹⁶ The exercise by courts of maritime tort jurisdiction over cases involving aircraft has taken place in the absence of guidance either from Congress or this Court. Only two of the statutes that are expressly applicable to aircraft appear to have any relevance. The Federal Aviation Act of 1958, 72 Stat. 799, as amended, 49 U.S.C. 1509(a), the successor to the Air Commerce Act of 1926, 44 Stat. 572, formerly 49 U.S.C. 177, exempts all aircraft, including seaplanes, from conformity with United States' navigation and shipping laws. This statute has been construed neither to create nor to limit judicial jurisdiction and as not precluding the exercise of admiralty jurisdiction over aircraft crashes into navigable waters. *Weinstein v. Eastern Airlines, Inc.*, *supra*, 316 F. 2d at 765-766. See, also, *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 93 (N.D. Calif.); *Lambros Seaplane Base v. The Batory*, *supra*, 215 F. 2d at 232.

In addition, by a provision of the criminal code, 18 U.S.C. 7(5), there are included within the United States' criminal jurisdiction offenses committed on any public or private United States' aircraft while in flight over the high seas or any other waters within the admiralty jurisdiction of the United States but outside the territorial jurisdiction of any State. See *United States v. Peoples*, 50 F. Supp. 462 (N.D. Calif.) and *United States v. Cordova*, 89 F. Supp. 298 (E.D.N.Y.), which indicate that the fact that crimes committed aboard aircraft flying over the high seas were not covered by statute led to the enactment in 1952 of that provision.

in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, the general maritime law did not permit an action for wrongful death. *The Harrisburg*, 119 U.S. 199. The only applicable remedy was provided by state wrongful death statutes, upon which suits in admiralty could be based. *Western Fuel Co. v. Garcia*, 257 U.S. 233. Although such a state statute could be applied to deaths on the high seas caused by tortfeasors who had a connection with the state (*The Hamilton*, 207 U.S. 398), most state wrongful death statutes were limited to occurrences on state territorial waters. Thus in most instances there could be no recovery for wrongful deaths occurring on the high seas. To fill this void, and to provide a uniform remedy for wrongful deaths on the high seas, Congress in 1920 enacted the Death on the High Seas Act, 46 U.S.C. 761, which provides:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representatives of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty * * *.

The first aircraft crash case brought under the Act was *Choy v. Pan-American Airways Co.*, 1941 Am. Mar. Cas. 483 (S.D.N.Y.), which involved an action on behalf of a passenger killed in the crash of a seaplane into the Pacific Ocean. The court, observing that the language of the Act is "broad" and "makes no reference to the navigation of vessels," sustained its application (1941 Am. Mar. Cas at 484-485), saying:

The statute certainly includes the phrase "on the high seas" but there is no reason why this should make the law operable only on a horizontal plane. The very next phrase "beyond a marine league from the shore of any State" may be said to include a vertical sense and another dimension. * * * The Death on the High Seas Act was intended to confer a right and we recognize no reason why its language should be narrowly construed whatever doubt may now exist that a given set of facts was in the minds of any of the legislators who framed or adopted it. * * *

Since *Choy*, the great majority of actions for wrongful death arising out of aircraft crashes into the sea beyond one marine league from shore have been brought pursuant to the Death on the High Seas Act. Admiralty jurisdiction under the Act has been sustained where death, or a wrongful act eventually resulting in death, occurred on or over the high seas.¹⁷

¹⁷ See, e.g., *Wyman v. Pan-American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S. 2d 420 (Sup. Ct.), affirmed, 267 App. Div. 947, 48 N.Y.S. 2d 459, appeal denied, 293 N.Y. 878, 49 N.Y.S. 2d 271, certiorari denied, 324 U.S. 882 (disappearance of transoceanic flight); *Pardonnet v. Flying Tiger Line, Inc.*, 233 F. Supp. 683 (N.D. Ill.) (same); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Calif.) (cause of crash of transoceanic flight unknown); *Trihey v. Transocean Air Lines*, 255 F. 2d 824 (C.A. 9) (same); *Lacey v. L. W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. Mass.) (crash into water allegedly caused by negligent inspection of aircraft while on land); *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D. N.J.) (same); *Lavello v. Danko*, 175 F. Supp. 92 (S.D. N.Y.) (same); *Stiles v. National Airlines, Inc.*, 161 F. Supp. 125 (E.D. La.), affirmed, 268 F. 2d 400 (C.A. 5), certiorari denied, 361 U.S. 885 (crash into water allegedly caused by failure of land-based airline personnel to advise pilot

Most courts have held that such actions are exclusively within admiralty jurisdiction.¹⁸

of turbulent weather conditions in flight path); *D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (C.A. 2) (death of passenger, allegedly caused by fear, on land four days after unscheduled landing of aircraft which had experienced engine trouble while flying over high seas); *Blumenthal v. United States*, 189 F. Supp. 439 (E.D. Pa.), affirmed, 306 F. 2d 16 (C.A. 3) (death by drowning after apparently successful bail-out of disabled aircraft); *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447 (E.D. N.Y.) (accidental ejection into sea of decedent from aircraft on radar test flight).

Contra, *King v. Pan American World Airways*, 166 F. Supp. 136 (N.D. Calif.), affirmed, 270 F. 2d 355 (C.A. 9.), certiorari denied, 362 U.S. 928 (in wrongful death action on behalf of airline employee against employer, Death on the High Seas Act held inapplicable and California Workmen's Compensation Act applied). Compare *Nalco Chemical Corp. v. Shea*, 419 F. 2d 572 (C.A. 5).

¹⁸ See, e.g., *Wilson v. Transocean Airlines*, *supra* at 91, 94-98; *Higa v. Transocean Airlines*, 124 F. Supp. 13, 15 (D. Hawaii), affirmed, 230 F. 2d 780, 783, 785 (C.A. 9), certiorari dismissed, 352 U.S. 802; *Noel v. Linea Aeropostal Venezolana*, 144 F. Supp. 359 and 154 F. Supp. 162 (S.D.N.Y.), affirmed, 247 F. 2d 677, 680 (C.A. 2), certiorari denied, 355 U.S. 907; *First National Bank in Greenwich v. National Airlines, Inc.*, 171 F. Supp. 528, 536 (S.D.N.Y.), affirmed, 288 F. 2d 621 (C.A. 2); *Gordon v. Reynolds*, 10 Cal. Rptr. 73 (Dist Ct. App.); *Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V.*, 188 F. Supp. 594, 597 (S.D.N.Y.), appeal dismissed, 299 F. 2d 78 (C.A. 2); *Blumenthal v. United States*, *supra*, 189 F. Supp. at 446; *Devlin v. Flying Tiger Lines, Inc.*, 220 F. Supp. 924, 928 (S.D.N.Y.); *Jennings v. Goodyear Aircraft Corp.*, 227 F. Supp. 246, 247-248 (D. Del.); *Dugas v. National Aircraft Corp.*, 300 F. Supp. 1167, 1168 (E.D. Pa.), remanded on other grounds, 438 F. 2d 1386, 1388 (C.A. 3); *Kropp v. Douglas Aircraft Co.*, *supra* at 453. Contra, *Choy v. Pan-American Airways Co.*, *supra*; *Wyman v. Pan-American Airway, Inc.*, *supra*; *Sierra v. Pan-American World Airways*, 107 F. Supp. 519 (D. P.R.); *Ledet v. United Aircraft Corp.*, 24 Misc. 2d 1010, 204 N.Y.S. 2d 604 (Sup. Ct.).

The cases holding that jurisdiction over tort claims involving aircraft brought under the Death on the High Seas Act was exclusively in admiralty were relied upon to create a further extension of admiralty jurisdiction to similar claims arising out of torts on or over navigable waters within one marine league of shore and navigable inland waterways.

The first such case to reach the courts grew out of the 1960 crash of an Eastern Airlines Electra that collided with birds over the runway and crashed into Boston Harbor within one minute after take-off. *Weinstein v. Eastern Airlines, Inc.*, 203 F. Supp. 430 (E.D. Pa.), reversed, 316 F. 2d 758 (C.A. 3), certiorari denied, 375 U.S. 940. Claims for wrongful death were brought in admiralty against Eastern for alleged negligence in operation and maintenance and against Lockheed and General Motors for alleged negligence in design and manufacture. Additional allegations of breach of warranty were also made against them. The district court dismissed both the tort and contract claims for lack of jurisdiction. Distinguishing air crash cases brought under the Death on the High Seas Act and rejecting libellants' exclusive reliance on locality, the court held that maritime tort jurisdiction depends (203 F. Supp. at 433):

in the absence of statute, [upon] a maritime locality plus some maritime connection * * *. Therefore, until Congress establishes such jurisdiction by statute, admiralty jurisdiction does not encompass causes of action arising from crashes of airplanes into the navigable waters of a state * * *.

Similarly, "[w]hile it * * * assumed that a contract between libellants' decedents and [Eastern] did exist," the court found that "such contract had no maritime aspects at all." 203 F. Supp. at 434. On appeal, the Third Circuit affirmed with respect to the contract claims but reversed with respect to the tort claims. Finding that there was both a maritime locality and, assuming its necessity, a maritime nexus, the court of appeals stated (316 F. 2d at 763-765):

An apt analogy to the situation at bar can be drawn * * * from the cases construing the Federal Death on the High Seas Act * * *. No reference to aircraft is made in the language of the Act. Nonetheless, it has been held clearly that tort claims for wrongful death arising out of the crash of an aircraft on navigable waters beyond one marine league from shore are within the terms of the Act and cognizable in admiralty.

* * * * *

In the appeals at bar the jurisdictional authority, 28 U.S.C.A. § 1333, is identical with that in the cases under the Death on the High Seas Act. The requisite statutory cause of action for wrongful death, however, is provided here by a state wrongful death act. If, as it has been held, a tort claim arising out of the crash of an airplane beyond the one marine league line is within the jurisdiction of admiralty, then *a fortiori* a crash of an aircraft just short of that line but still within the navigable waters is within that jurisdiction as well. To hold otherwise would be to impose an illogical and irrational distinction on the operation of the broad grant of admiralty jurisdiction extended by the

Constitution and implemented by 28 U.S.C.A. § 1333 [footnotes omitted].

Subsequent cases have sustained admiralty jurisdiction over claims for wrongful death or personal injury arising out of aircraft accidents occurring on or over navigable waters within one marine league of shore and navigable inland waterways, as well as personal injury claims arising out of aircraft accidents occurring on or over the high seas.¹⁹

With the exception of *Weinstein*²⁰ and other cases

¹⁹ See *Bergeron v. Aero Associates, Inc.*, 213 F. Supp. 936 (E.D. La.) (decedents' survivors have cause of action for wrongful death under Death on the High Seas Act and injured plaintiff has cause of action in maritime tort for helicopter crash into high seas); *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874 (W.D. Pa.) (personal injuries sustained when aircraft jolted while flying over high seas); *Horton v. J. & J. Aircraft, Inc.*, 257 F. Supp. 120 (S.D. Fla.) (personal injuries sustained in crash of aircraft into high seas); *Harris v. United Air Lines, Inc.*, 275 F. Supp. 431 (S.D. Iowa) (wrongful death arising out of crash of aircraft into Lake Michigan); *Thomas v. United Air Lines, Inc.*, 54 Misc. 2d 540, 281 N.Y.S. 2d 495 (Sup. Ct.), reversed on other grounds, 30 App. Div. 2d 32, 290 N.Y.S. 2d 753, reversed on other grounds, 24 N.Y. 2d 714, 301 N.Y.S. 2d 973, certiorari denied, 396 U.S. 991 (same); *Hornsby v. The Fishmeal Co.*, 285 F. Supp. 990 (W.D. La.) (wrongful death arising out of aircraft collision over Louisiana territorial waters), reversed on other grounds, 431 F. 2d 865 (C.A. 5).

²⁰ Even *Weinstein* did not sustain admiralty jurisdiction on the basis of locality alone. The court "[a]ssum[ed] *arguendo* that some kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdiction" and concluded that a crash into navigable water provided that nexus. 316 F. 2d at 763. As we discuss *infra*, this concept of maritime nexus not only equates maritime relation with maritime locality, but equates it with an erroneous concept of maritime locality.

arising from the Boston Harbor crash," the torts in all these aircraft accident cases not only have had a maritime locality, in that the alleged negligence became operative or effective while the aircraft was over navigable waters, but also have had a significant relation to maritime commerce or navigation, in that the aircraft involved was at the time performing a function that previously would have been performed by a ship or other waterborne vessel. Thus, the aircraft crash cases in lower courts, for the most part, support the view that a maritime relation has been a "condition *sub silentio* to admiralty jurisdiction." *Chapman v. City of Grosse Pointe Farms, supra*, 358 F. 2d at 966.

This is the first aircraft crash case brought in admiralty to reach this Court. For reasons to which we now turn, we urge this Court to hold that a maritime relation, in addition to a maritime locality, is a prerequisite to the exercise of admiralty tort jurisdiction over aircraft accident cases.

C. THE EXERCISE OF ADMIRALTY JURISDICTION IN AIRCRAFT ACCIDENT CASES REQUIRES THAT THE TORT BEAR A SIGNIFICANT RELATION TO MARITIME COMMERCE OR NAVIGATION WHICH IS ABSENT IN THIS CASE

"We are dealing here with the intersection of federal and state law" (*Victory Carriers, Inc. v. Law,*

"A further exception may have been involved in the Lake Michigan crashes litigated in *Harris v. United Airlines, Inc., supra*, and *Thomas v. United Airlines, Inc., supra*. The facts as stated in the opinions are insufficient to determine if the aircraft was transporting passengers across the Lake, or passed over the Lake fortuitously.

404 U.S. 202, 211-212). In *Victory Carriers*, involving an attempt to expand the doctrine of unseaworthiness, this Court recently admonished that "[i]n these circumstances we should proceed with caution * * *" (*id.* at 212). Quoting from *Healy v. Ratta*, 292 U.S. 263, 274, the court observed (404 U.S. at 212):

The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution * * *. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.

This case appears to have been brought in admiralty to escape both the substantive and procedural limitations of Ohio law (see note 1, *supra*).²² But there is

²² There are significant differences between maritime and non-maritime procedures, remedies and defenses, most of which, as the circumstances of this case demonstrate (see note 1, *supra*), favor the plaintiff's choice of admiralty. In admiralty a libellant may bring his action in a federal district court, without regard to diversity of citizenship, amount in controversy or any other independent basis of federal jurisdiction, in any district in which the defendant can be served or in which any of the defendant's credits or effects can be attached. *Strattan v. Jarvis & Brown*, 8 Pet. 4 (amount in controversy); *The Robert W. Parsons*, 191 U.S. 17; *Peyroux v. Howard*, 7 Pet. 324 (diversity of citizenship); Fed. R. Civ. P. 82 and Adm. & Maritime Claims Supp. Rule E (28 U.S.C. App., p. 7866). Although not entitled to a trial by jury, a claimant in admiralty has the benefit of a more liberal substantive law, including recovery on the basis of comparative negligence, rather than being precluded by his con-

nothing in the facts of the case which warrants displacement of state law. As the court observed in *Smith v. Guerrant, supra*, 290 F. Supp. at 113-114:

Disputes like the present one, which is only incidentally related to navigable waters and wholly unconnected with maritime commerce, can be litigated in state courts under the diverse rules of state law without affecting maritime endeavors. The basis for the special grant of admiralty jurisdiction is absent here.

While we believe the facts of this case place it outside admiralty jurisdiction on the basis of locality alone, we urge that locality alone, in the absence of a significant relation to maritime affairs, is an insufficient justification for displacing state law in aircraft accident cases. In flights which are principally over land, the fact that an aircraft happens to fall in navigable waters is wholly fortuitous. State law should not be ousted as a basis for deciding disputes in which the state has the paramount interest.

Moreover, the locality test in such cases may even lack "its alleged ease of application." (7A Moore, *Federal Practice, Admiralty* ¶.325[4]). Since the cause of action arises where the alleged negligence took effect (Point II, *infra*), disputes over that question in aircraft cases will invoke further litigation.

A test of admiralty jurisdiction which requires a showing of a significant relationship of the tort to

tributory negligence, *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406, 408-409, and in the absence of a federal statute to the contrary his claim is barred only by laches, not traditional statutes of limitations. *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 533; *Gardner v. Panama Railroad Co.*, 342 U.S. 25, 30-31.

maritime navigation and commerce would assure that the aircraft accident cases heard in admiralty would involve issues similar to those traditionally reserved to admiralty. By the same token it would justify displacement of state law in the interest of developing uniform rules for maritime affairs, which is the historic "basis for the special grant of admiralty jurisdiction" (*Smith v. Guerrant, supra*, 290 F. 2d at 113).

In our view an aircraft may be said to bear a significant relationship to maritime commerce and navigation only when it is performing functions previously performed by ships or vessels.²³ The petitioners suggest (Pet. Br. 57-61) that any aircraft falling into navigable water has a sufficient relationship to maritime commerce and navigation to satisfy the test of maritime relationship, assuming such a relationship is required. We suggest that such a view of maritime relationship reduces that criterion to nothing more than the maritime locality test. Not everything that happens on or over the water relates to navigation or maritime commerce. If the mere happenstance that an aircraft falls into navigable waters creates a maritime relationship, then that test is the same as the maritime locality test. Moreover, as the circumstances of this case indicate (Point II, *infra*), not every alleged tort which results in an aircraft coming to rest in navigable waters has a maritime locality. Therefore,

²³ Apart from transoceanic transportation, a good example of such use of aircraft is shown in *Hornsby v. The Fishmeal Co., supra*, where two light aircraft used in spotting schools of fish collided.

the petitioners' proposed test of maritime relationship—the bald fact of a crash into, or accident over, navigable waters—might be satisfied even where the maritime locality test is not.

If an alleged tort must bear a significant relationship to maritime concerns in order to be cognizable in admiralty, then this case was not properly brought in admiralty. This point was well stated by the district court (Pet. App. 40a-41a):

Assuming * * * that air commerce bears some relationship to maritime commerce when the former is carried out over navigable waters, the relevant circumstances here were unconnected with the maritime facets of air commerce. The claimed "wrong" in this case was the alleged failure to keep the runway free of birds and the failure to adequately warn the pilots of their presence upon the end of the runway. When the alleged negligence occurred, and when it became operative upon the aircraft, all the parties were engaged in functions common to all air commerce, whether over land or over sea.

There is no contention here that the entire spectrum of air travel is imbued with a maritime character merely because some airplanes at certain times might pass over navigable waters. Thus, the conclusion here must be that the operative facts of the claim in this case are concerned with the land-connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off. * * *

II

EVEN ON THE BASIS OF THE LOCALITY OF THE IMPACT
OF THE ALLEGED WRONGFUL ACTS, PETITIONERS'
CLAIMS ARE NOT COGNIZABLE IN ADMIRALTY

The wrongful acts or omissions of which petitioners complain are the alleged failure of air traffic controller Dicken to warn the crew of their aircraft of the seagulls on the runway and the alleged failure of the City of Cleveland and its airport manager to remove those seagulls from the runway (App. 3-4). The result was a collision over the runway on take-off between the aircraft and a number of seagulls, which caused considerable damage to the aircraft's engines and body and, in turn, led to the crash. Thus, the impact of the alleged wrongful acts or omissions that caused the crash occurred while petitioners' aircraft was over land (see pp. 3-4, *supra*). Accordingly petitioners claims are not cognizable in admiralty.

In applying the locality test of admiralty jurisdiction, it is established that the tort is deemed to have occurred where the wrongful act or omission produced such injury as to give rise to the cause of action.²⁴ In

²⁴ See e.g., *The Plymouth*, *supra*, 3 Wall. at 36; *Johnson v. Chicago and Pacific Elevator Co.*, 119 U.S. 388, 397; *Cleveland Terminal & Valley Railroad Co. v. Cleveland Steamship Co.*, 208 U.S. 316, 319-320; *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179, 181-182; *Vancouver Steamship Co. v. Rice*, 288 U.S. 445, 448; *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 649; *The Admiral Peoples*, 295 U.S. 649, 653; *The Strabo*, 98 Fed. 998, 1000 (C.A. 2); *Fireman's Fund Ins. Co. v. City of Monterey*, 6 F. 2d 893, 894 (N.D. Calif.); *Thomson v. Bassett*, 86 F. Supp. 956, 957-958 (W.D. Mich.); *The S. S. Samovar*, 72 F. Supp. 574, 583 (N.D. Calif.); *Lacey v. L. W. Wiggins Airways, Inc.*, *supra*, 95 F. Supp. at 918; *Wilson v. Transocean Air*

The Plymouth, *supra*, 3 Wall. at 36, relied upon extensively by petitioners, the Court denied admiralty jurisdiction with the observation that, since "the cause of action [was] not * * * complete on navigable waters, [the fact that the negligence occurred on board a vessel] affords no ground for the exercise of admiralty jurisdiction." In *T. Smith & Son, Inc. v. Taylor*, *supra*, 276 U.S. at 182, where a longshoreman was knocked from the wharf into the water by a sling loaded with cargo which was being lowered over the side of a ship, the Court rejected admiralty jurisdiction because the "[the blow] was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death. * * *

The substance and consummation of the occurrence which gave rise to the cause of action took place on land. *The Plymouth*, *supra*."

In this case, the aircraft was damaged and disabled over land. The fact that the bulk of the damage may have been caused by water does not alter the location of the tort. In *T. Smith & Son, Inc. v. Taylor*, *supra*, 276 U.S. at 182, this Court held:

[Plaintiff in error] argues that as no claim was made for injuries sustained while deceased was

lines, *supra*, 121 F. Supp. at 92; *Noel v. Airponents, Inc.*, *supra*, 169 F. Supp. at 350; *Lavello v. Danko*, *supra*, 175 F. Supp. at 93; *Weinstein v. Eastern Airlines, Inc.*, *supra*, 316 F. 2d at 765; *Thomson v. Chesapeake Yacht Club, Inc.*, *supra*, 255 F. Supp. at 558; *Union Marine & General Insurance Co. v. American Export Lines, Inc.*, 274 F. Supp. 123, 130 (S.D.N.Y.); *Chapman v. City of Grosse Pointe Farms*, *supra*, 385 F. 2d at 964; *McCall v. The Susquehanna Electric Co.*, 278 F. Supp. 209, 211 (D. Md.); *Watz v. Zapata Off-Shore Co.*, *supra*, 431 F. 2d at 109.

on land and as the suit was solely for death that occurred in the river, the case is exclusively within the admiralty jurisdiction. * * * The contention of plaintiff in error is without merit.

Similarly, in *The Admiral Peoples*, *supra*, this Court sustained admiralty jurisdiction over injuries suffered by a passenger who fell onto the wharf from a negligently placed or constructed gangplank. The Court approved the lower court's statement that (295 U.S. at 653) "The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water."

Contrary to the petitioners' contention, the distinctions made by these cases continue to have relevance in determining jurisdiction in cases where the injury has connections with both land and water.²⁸ In *Wiper v. Great Lakes Engraving Works*, 340 F. 2d 727 (C.A. 6), the decedent's executor asserted that her claim for a death by drowning in a fall from a negligently maintained dock was governed by maritime law. The court affirmed the dismissal of the claim, noting (340 F. 2d at 730):

²⁸ Cases in this Court under the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. 901-950, do not suggest any departure from these earlier cases. Cf. *Nacirema Operating Co., Inc., v. Johnson*, 396 U.S. 212.

[T]he negligently maintained dock which presumably caused the decedent to fall was land, and the decedent was on land at the time he was caused to fall. Thus, the tort was complete before decedent ever touched the water and this being true, the subsequent drowning is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages, *Cleveland Terminal and Valley R.R. Co. v. Cleveland Steamship Co.*, 208 U.S. 316 * * * (1908); *The Plymouth*, 3 Wall. 20 * * * (1865).

None of the aircraft tort cases relied upon by petitioners (Pet. Br. 23-40) supports their contention that their property damage claims are cognizable in admiralty. Each of the cases cited—most of which were brought pursuant to the Death on the High Seas Act (see pp. 20-23, *supra*)—involved claims for wrongful death or injury arising out of aircraft crashes into navigable waters or aircraft incidents occurring over navigable waters. Regardless of where the wrongful act causing the crash or incident in each case occurred, the death or injury giving rise to a cause of action was not produced until the crash into or the incident over navigable waters occurred. On the basis of the locality criterion, the torts in each cited case would be deemed to have occurred on navigable waters, and the claims would have been properly adjudicated in admiralty.

The courts below therefore correctly held that petitioners' claims are not cognizable in admiralty because the alleged torts occurred on land before the aircraft reached Lake Erie.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1972.



NOV 9

MICHAEL RODAK,

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 71-678

EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners*

V.

CITY OF CLEVELAND, OHIO, ET AL., *Respondents*

PETITIONERS' REPLY BRIEF ON THE MERITS

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November 9, 1972

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 71-678

EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners*

v.

CITY OF CLEVELAND, OHIO, ET AL., *Respondents*

PETITIONERS' REPLY BRIEF ON THE MERITS

Petitioners Executive Jet Aviation, Inc. and Executive Jet Sales, Inc.¹ submit the following in reply to the arguments made and the authorities cited in the Briefs of respondents City of Cleveland, Ohio, and Phillip A. Schwenz,² and respondent Howard E. Dicken.³

¹ Hereinafter petitioners will be referred to collectively as "EJA."

² Hereinafter referred to collectively as "the City."

³ Hereinafter referred to as Dicken.

I.

RESPONDENTS' SHARP DISAGREEMENT OVER THE PROPER TEST TO BE APPLIED IN CASES INVOLVING AIRCRAFT CRASHES IN NAVIGABLE WATERS EMPHASIZES THE CLEAR ERROR OF THE COURT BELOW

In its brief the City argues that the court of appeals' holding in this case—that the tort occurred on land by virtue of this Court's rulings in *Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928); *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); and *The Admiral People's*, 295 U.S. 649 (1935)—should be affirmed, and that the question of maritime nexus is not here presented. As stated by the City, . . . "[T]here is admittedly a conflict between the Third and Sixth Circuits as to the requirement of a maritime nexus. . . . This conflict may well be one which should be resolved by this Court. But *this case* does *not* present a record on which the conflict can be decided." Brief of the City at 25.

The Government, arguing on behalf of air traffic controller Dicken, argues on the other hand that this Court should use this aviation case as a vehicle to "resolve Mr. Benedict's 'celebrated doubt,'" and to fashion a "locality plus" rule for all maritime tort cases—including those involving injured swimmers, surfboard riders and the like.⁴ The Government concedes that an irreconcilable conflict exists between the Sixth Circuit's ruling in this case and the Third Circuit's decision in *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940

⁴ It is interesting to note that at the district court and the court of appeals Dicken simply adopted the arguments made by the City in this case. In its Brief for Dicken filed in this Court the Solicitor General clearly parts company with both The City and the Sixth Circuit.

(1963); it urges this court to reject the *Weinstein* approach but is unwilling to support the Sixth Circuit's decision. The Government does not argue that cases involving aircraft crashes in navigable waters are "controlled" by the longshoremen's compensation cases relied upon by the Sixth Circuit. In fact, it recognizes the impracticalities of such a rule. "Since the cause of action arises where the alleged negligence took effect," the Government states, "...disputes over that question in aircraft cases will involve further litigation." Brief of Dicken at 29. Rather, the Government argues that admiralty jurisdiction should be found only in those cases involving aircraft crashes in navigable waters where there is "the presence of a 'maritime relation.'" *Id* at 18.

The respondents are also unable to agree as to what should constitute a "maritime nexus," or a "maritime relation." The City, arguing in the alternative, adopts the Sixth Circuit's view that a maritime nexus can exist only if "the *wrong* has a relationship to maritime affairs." Brief for the City at 33. The Government argues that a case involving an aircraft crash in navigable waters will have a maritime relation only if "the aircraft involved was at the time performing a function that previously would have been performed by a ship or other waterborne vessel." Brief of Dicken at 27. As an example, Dicken cites the case of *Hornsby v. The Fishmeal Co.*, 431 F.2d 865 (5th Cir. 1970), where two light aircraft collided while spotting fish and thereafter crashed into territorial navigable waters in the Gulf of Mexico.

Hornsby is a good illustration of why the respondents cannot get together in this case. First, *Hornsby* clearly holds contrary to the statements of both respondents

that the Fifth Circuit is a "locality plus" circuit insofar as aviation cases are concerned. The district court in *Hornsby* stated, "Tort claims arising out of the collision of land-based aircraft on navigable waters within the territorial waters of a state are cognizable in Admiralty." *Hornsby v. The Fishmeal Co.*, 285 F. Supp. 990, 993 (W.D.La. 1968). Furthermore, the City cannot make any plausible argument that a maritime nexus existed in *Hornsby* (because the *wrong* there alleged had a relationship to maritime affairs), and argue at the same time that no maritime nexus exists in this case. In *Hornsby* the "wrong" alleged was that the pilot in question violated 14 C.F.R. 91.67E, a Federal Aviation Regulation pertaining to the right-of-way of orbiting aircraft. It would be hard to imagine a more aviation-oriented "wrong;" yet the Fifth Circuit found the case to be cognizable in admiralty.

Two recent cases which have been reported since the filing of EJA's brief in this case further illustrate that, apart from the Sixth Circuit, the lower federal courts simply do not spend any time straining to see whether a case involving the crash of an aircraft in navigable waters is cognizable in admiralty either because the wrongs alleged have some relation to maritime affairs or because the aircraft in question was performing functions previously performed by vessels. *Lindsay v. McDonnell Douglas Aircraft Corporation*, 460 F.2d 631 (8th Cir. 1972); *Kelley v. Central National Bank of Richmond*, 345 F. Supp. 737 (E.D.Va. 1972). In *Lindsay* the Eighth Circuit held that claims arising out of the crash of a jet fighter aircraft in the Gulf of Mexico about 75 miles west of Key West, Florida, were cognizable in admiralty. At the time of the crash

the pilot and radar intercept officer were flying a night air intercept training mission. The "wrong" alleged was that the design of the aircraft was defective. In *Kelley* a district court held that claims arising out of the crash of a light aircraft 2400 yards offshore at Melbourne, Florida, were cognizable in admiralty. At the time of the crash the pilot, a doctor, was flying with a friend back to his home in Richmond, Virginia, from Pompano Beach, Florida, where they had been playing golf. The "wrong" alleged was that the doctor negligently took off into bad weather when he was not licensed to fly the aircraft on instruments..

The *Lindsay* case, *supra*, also points up another fallacious argument in the City's brief. The City argues that "admiralty law is not suited for the adjudication of issues arising in aviation tort cases." Brief of the City at 34. As an example the City states, "In many air crash cases claims are made that the manufacturer of the plane or one or more of its components was negligent in the design, manufacture or testing of the aircraft or component.... Surely it needs no extended exposition to demonstrate that the complex, technical questions presented by such claims are wholly unrelated to any possible aspect of admiralty law." *Id* at 36. The Eighth Circuit did not find this reasoning persuasive in *Lindsay*. There the defendant aircraft manufacturer argued that the doctrine of a manufacturer's strict liability in tort, as stated in the RESTATEMENT (SECOND) OF TORTS § 402A, was inapplicable in admiralty. The Eighth Circuit said:

The Death on the High Seas Act creates a cause of action for wrongful death.... Jurisdiction of this action would rest in the federal dis-

trict courts in admiralty. We feel this federal cause of action must follow general maritime law *which in turn incorporates the general law of torts where it is harmonious with admiralty law.* [Citing cases]

While the doctrine of strict liability in tort... at its inception did not have the wide acceptance which would justify its incorporation into the general maritime law [citing cases], it has gained general acceptance in the intervening years and has been incorporated into admiralty law. [Citing cases]

We think now that the doctrine of strict liability in tort is a part of the general maritime law and it is thus available to the plaintiff under the Death on the High Seas Act, which applies federal admiralty law. [Citing cases]. 460 F.2d at 636, (emphasis added).

In actual fact, for the past thirty years *every* court except the Sixth Circuit has applied the federal admiralty law to *every* case of an aircraft crashing in navigable waters whether the case involved a claim for death under the Death on the High Seas Act, a claim for death under a state statute or the general maritime law, a claim for personal injury or a claim for property damage to the aircraft. In *every* such case the courts have been perfectly able to determine the issues under the general maritime law, borrowing where necessary those doctrines which are harmonious with admiralty law.

The maritime relation in cases involving the crash of aircraft into navigable waters—which both respon-

dents spend so much time discussing—comes about because of the analogy “not between flying aircraft and sailing ships, but between a downed plane and a sinking ship.”⁵ As Judge Biggs stated in *Weinstein, supra*, “When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels.” 316 F.2d at 763. To this Judge Edwards, in his dissent in this case, added:

I believe that there are many comparisons between the problems of aircraft over navigable waters and those of the ships which the aircraft are rapidly replacing.... Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings on land.... In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers.... *What I would hold is that tort cases arising out of aircraft crashes into navigable waters are cognizable in admiralty jurisdiction even if the negligent conduct is alleged to have happened wholly on land.* (Pet. for Cert., App. A, p. 24a, emphasis added).

EJA respectfully submits that the opinion of the Third Circuit in *Weinstein* and the dissenting opinion of Judge Edwards in this case state the proper resolution of this issue; that, except for the Sixth Circuit's opinion in this case, the lower federal courts have for

⁵ Note, *Admiralty—Jurisdiction Over Airplane Crashes On Navigable Waters*, 18 Wayne L.Rev. 1569, 1583 (1972).

thirty years resolved the issue in this manner; and that the court of appeals' ruling in this case is clearly erroneous and should be reversed by this Court.

Respectfully submitted,

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November 9, 1972

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 300 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

EXECUTIVE JET AVIATION, INC. v. CITY OF CLEVELAND, OHIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-678. Argued November 15, 1972—

Decided December 18, 1972

Petitioners, invoking federal admiralty jurisdiction under 28 U. S. C. § 1331 (1), brought suit for damages resulting from the crash-landing and sinking in the navigable waters of Lake Erie of their jet aircraft shortly after takeoff from a Cleveland airport. The District Court dismissed the complaint for lack of admiralty jurisdiction on the grounds that the alleged tort had neither a maritime locality nor a maritime nexus. The Court of Appeals affirmed on the first ground. *Held*: Neither the fact that an aircraft goes down on navigable waters nor that the negligence "occurs" while the aircraft is flying over such waters is sufficient to confer federal admiralty jurisdiction over aviation tort claims, and in the absence of legislation to the contrary such jurisdiction exists with respect to those claims only when there is a significant relationship to traditional maritime activity. Therefore, federal admiralty jurisdiction does not extend to aviation tort claims arising from flights like the one involved here between points within the continental United States. Pp. 4-25.

448 F. 2d 151, affirmed.

STEWART, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-678

Executive Jet Aviation, Inc.,
et al., Petitioners,
v.
City of Cleveland, Ohio,
et al.

On Writ of Certiorari to
the United States Court
of Appeals for the Sixth
Circuit.

[December 18, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

On July 28, 1968, a jet aircraft, owned and operated by the petitioners, struck a flock of seagulls as it was taking off from Burke Lakefront Airport in Cleveland, Ohio, adjacent to Lake Erie. As a result, the plane lost its power, crashed, and ultimately sank in the navigable waters of Lake Erie, a short distance from the airport. The question before us is whether the petitioners' suit for property damage to the aircraft, allegedly caused by the respondents' negligence, lies within federal admiralty jurisdiction.

When the crash occurred, the plane was manned by a pilot, a co-pilot, and a stewardess, and was departing Cleveland on a charter flight to Portland, Maine, where it was to pick up passengers and then continue to White Plains, New York. After being cleared for takeoff by the respondent Dicken, who was the federal air traffic controller at the airport, the plane took off, becoming airborne at about half the distance down the runway. The takeoff flushed the seagulls on the runway, and they rose into the airspace directly ahead of the ascending plane. Ingestion of the birds into the plane's jet

engines caused an almost total loss of power. Descending back toward the runway in a semi-stalled condition, the plane veered slightly to the left, struck a portion of the airport perimeter fence and the top of a nearby pickup truck, and then settled in Lake Erie just off the end of the runway and less than one-fifth of a statute mile off shore. There were no injuries to the crew, but the aircraft soon sank and became a total loss.

Invoking federal admiralty jurisdiction under 28 U. S. C. § 1333 (1),¹ the petitioners brought this suit for damages in the Northern District of Ohio against Dicken and the other respondents,² alleging that the crash had been caused by the respondents' negligent failure to keep the runway free of the birds or to give adequate warning of their presence.³ The District Court, in an unreported opinion, held that the suit was not cognizable in admiralty and dismissed the complaint for lack of subject matter jurisdiction.

Relying primarily on the Sixth Circuit precedent of *Chapman v. City of Grosse Pointe Farms*, 385 F. 2d 962 (1967), the District Court held that admiralty jurisdiction over torts may properly be invoked only when two criteria are met: (1) the locality where the alleged tortious wrong occurred must have been on navigable

¹ That section provides:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

² Besides Dicken, the respondents are the City of Cleveland, as owner and operator of the airport, and Phillip A. Schwenz, the airport manager.

³ The petitioners also filed an action against Dicken's employer, the United States, under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b) and 2674, asserting the same claim. That action is pending in the District Court for the Northern District of Ohio.

waters; and (2) there must have been a relationship between the wrong and some maritime service, navigation, or commerce on navigable waters. The District Court found that the allegations of the petitioners' complaint satisfied neither of these criteria. With respect to the locality of the alleged wrong, the court stated that "the alleged negligence became operative upon the aircraft while it was over the land; and in this sense the 'impact' of the alleged negligence occurred when the gulls disabled the plane's engines [over the land] From this point on the plane was disabled and was caused to fall. Whether it came down upon land or upon water was largely fortuitous." Alternatively, the court concluded that the wrong bore no relationship to maritime service, navigation, or commerce:

"Assuming . . . that air commerce bears some relationship to maritime commerce when the former is carried out over navigable waters, the relevant circumstances here were unconnected with the maritime facets of air commerce. The claimed 'wrong' in this case was the alleged failure to keep the runway free of birds and the failure to adequately warn the pilots of their presence upon the end of the runway. When the alleged negligence occurred, and when it became operative upon the aircraft, all the parties were engaged in functions common to all air commerce, whether over land or over sea.

"Thus, the conclusion here must be that the operative facts of the claim in this case are concerned with the land-connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off."

4 EXECUTIVE JET AVIATION v. CITY OF CLEVELAND

The Court of Appeals for the Sixth Circuit affirmed on the ground that "the alleged tort in this case occurred on land before the aircraft reached Lake Erie" 448 F. 2d 151, 154 (1971). Hence, that court found it "not necessary to consider the question of maritime relationship or nexus discussed by this Court in [*Chapman*]." *Ibid*. We granted certiorari to consider a seemingly important question affecting the jurisdiction of the federal courts. 405 U. S. 915 (1972).

I

Determination of the question whether a tort is "maritime" and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not. As early as 1813, Mr. Justice Story on Circuit stated this general principle:

"In regard to torts, I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide."

Thomas v. Lane, 23 Fed. Cas. 957, 960 (C. C. D. Me). See also *DeLovio v. Boit*, 7 Fed. Cas. 418, 444 (C. C. D. Mass. 1815); *Pennsylvania, Wilmington and Baltimore R. Co. v. The Philadelphia and Havre de Grace Steam Towboat Co.*, 64 U. S. (23 How.) 209, 215 (1859). Later, this locality test was expanded to include not only tide-waters, but all navigable waters, including lakes and rivers. *The Genesee Chief v. Fitzhugh*, 53 U. S. (12 How.) 443 (1851).

In *The Plymouth*, 70 U. S. (3 Wall.) 20, 35, 36 (1866), the Court essayed a definition of when a tort is "located" on navigable waters:

"[T]he wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. . . . The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed on the high seas or other navigable waters. . . . Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

The Court has often reiterated this rule of locality.⁴ As recently as last Term, in *Victory Carriers, Inc. v. Law*, 404 U. S. 202, 205, we repeated that "[t]he historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States."

This locality test, of course, was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a water vessel. Indeed, for the traditional types of maritime torts, the traditional test has worked quite satisfactorily. As a leading admiralty text has put the matter:

"It should be stressed that the important cases in admiralty are *not* the borderline cases on juris-

⁴ In *Victory Carriers, Inc. v. Law*, 404 U. S. 202, 205 n. 2 (1971), we cited over 40 cases to this effect.

diction; these may exercise a perverse fascination in the occasion they afford for elaborate casuistry, but the main business of the [admiralty] court involves claims for cargo damage, collision, seamen's injuries and the like—all well and comfortably within the circle, and far from the penumbra." G. Gilmore & C. Black, *The Law of Admiralty* 24 n. 88 (1957).

But it is the perverse and casuistic borderline situations that have demonstrated some of the problems with the locality test of maritime tort jurisdiction. In *Smith & Son v. Taylor*, 276 U. S. 179 (1928), for instance, a longshoreman unloading a vessel was standing on the pier when he was struck by a cargo-laden sling from the ship and knocked into the water where he was later found dead. This Court held that there was no admiralty jurisdiction in that case, despite the fact that the longshoreman was knocked into the water, because the blow by the sling was what gave rise to the cause of action, and it took effect on the land. Hence, the Court concluded, "[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land." 276 U. S., at 182. In the converse factual setting, however, where a longshoreman working on the deck of a vessel was struck by a hoist and knocked onto the pier, the Court upheld admiralty jurisdiction because the cause of action arose on the vessel. *Minnie v. Port Huron Terminal Co.*, 295 U. S. 647 (1935). See also *The Admiral Peoples*, 295 U. S. 649 (1935).

Other serious difficulties with the locality test are illustrated by cases where the maritime locality of the tort is clear, but where the invocation of admiralty jurisdiction seems almost absurd. If a swimmer at a public beach is injured by another swimmer or by a submerged object on the bottom, or if a piece of machinery sustains

water damage from being dropped into a harbor by a land-based crane, a literal application of the locality test invokes not only the jurisdiction of the federal courts, but the full panoply of the substantive admiralty law as well. In cases such as these, some courts have adhered to a mechanical application of the strict locality rule and have sustained admiralty jurisdiction despite the lack of any connection between the wrong and traditional forms of maritime commerce and navigation.⁵ Other courts, however, have held in such situations that a maritime locality is not sufficient to bring the tort within federal admiralty jurisdiction, but that there must also be a maritime nexus—some relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters. The Court of Appeals for the Sixth Circuit, for instance, in the *Chapman* case, where a swimmer at a public beach was injured, held that

“[a]bsent such a relationship, admiralty jurisdiction would depend entirely on the fact that a tort occurred on navigable waters; a fact which in and of itself, in light of the historical justification for federal admiralty jurisdiction, is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts.” 385 F. 2d, at 966.⁶

⁵ *Davis v. City of Jacksonville Beach, Florida*, 251 F. Supp. 327 (MD Fla. 1965) (injury to a swimmer by a surfboard); *King v. Teeterman*, 214 F. Supp. 335, 336 (ED Tenn. 1963) (injuries to a water skier). See also *Horton v. J & J Aircraft, Inc.*, 257 F. Supp. 120, 121 (SD Fla. 1966). Cf. *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758 (CA3 1963).

⁶ In another injured swimmer case, *McGuire v. City of New York*, 192 F. Supp. 866, 871-872 (SDNY 1961), the court stated:

“The proper scope of jurisdiction should include all matters relating to the business of the sea and the business conducted on navigable waters.

“The libel in this case does not relate to any tort which grows out of navigation. It alleges an ordinary tort, no different in substance

As early as 1850, admiralty scholars began to suggest that a traditional maritime activity, as well as a maritime locality, is necessary to invoke admiralty jurisdiction over torts. In that year, Judge Benedict expressed his "celebrated doubt" as to whether such jurisdiction did not depend, in addition to a maritime locality, upon some "relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels to which Admiralty jurisdiction, in cases of contracts, applies." Benedict, *The Law of American Admiralty* 173 (1850). More recently, commentators have actively criticized the rule of locality as the sole criterion for admiralty jurisdiction, and have recommended adoption of a maritime relationship requirement as well. See 7A Moore, *Federal Practice, Admiralty*, ¶ 325 [3] and ¶ 325 [5];

because the injury occurred in shallow waters along the shore than if the injury had occurred on the sandy beach above the water line. Whether the City of New York should be held liable for the injury suffered by libellant is a question which can easily be determined in the courts of the locality. To endeavor to project such an action into the federal courts on the ground of admiralty jurisdiction is to misinterpret the nature of admiralty jurisdiction."

Other cases holding that admiralty jurisdiction was not properly invoked because the tort, while having a maritime locality, lacked a significant relationship to maritime navigation and commerce, include: *Peytavin v. Government Employees Insurance Co.*, 453 F. 2d 1121 (CA5 1972); *Gowdy v. United States*, 412 F. 2d 525, 527-529 (CA6 1969); *Smith v. Guerrant*, 290 F. Supp. 111, 113-114 (SD Tex. 1968). See also *J. W. Peterson Coal & Oil Co. v. United States*, 323 F. Supp. 1198, 1201 (ND Ill. 1970); *O'Connor and Co. v. City of Pascagoula, Miss.*, 304 F. Supp. 681, 683 (SD Miss. 1969); *Hastings v. Mann*, 226 F. Supp. 962, 964-965 (EDNC 1964), aff'd, 340 F. 2d 910 (CA4 1965). A similar view is taken by the English courts. *The Queen v. The Judge of the City of London Court*, 1 Q. B. 273 (1892).

⁷ Hough, *Admiralty Jurisdiction—Of Late Years*, 37 Harv. L. Rev. 529, 531 (1924).

Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Colum. L. Rev. 259, 264 (1950). In 1969, the American Law Institute's Study of the Division of Jurisdiction Between State and Federal Courts ("ALI Study") also made that recommendation, stating (at p. 233):

"It is hard to think of any reason why access to federal court should be allowed without regard to amount in controversy or citizenship of the parties merely because of the fortuity that a tort occurred on navigable waters, rather than on other waters or on land. The federal courts should not be burdened with every case of an injured swimmer."

Despite the broad language of cases like *The Plymouth*, *supra*, the fact is that this Court has never explicitly held that a maritime locality is the sole test of admiralty tort jurisdiction. The last time the Court considered the matter, the question was left open. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52 (1914). In that case, a stevedore brought suit for injuries sustained on board a vessel while loading and stowing copper. The petitioner admitted the maritime locality of the tort, but contended that no maritime relationship was present. The Court sustained federal admiralty jurisdiction, but found that it was not necessary to decide whether locality alone is sufficient:

"Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction. . . .

"If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navi-

gation and to commerce on navigable waters, was quite sufficient." 234 U. S., at 61, 62.

Since the time of that decision the Court has not squarely dealt with the question left open there, although opinions in several cases have discussed the maritime or non-maritime nature of the tort and its relationship to maritime navigation. In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U. S. 352 (1969), for instance, we held that admiralty had no jurisdiction of wrongful death actions under the Death on the High Seas Act, 46 U. S. C. § 761 *et seq.*, arising out of accidents on artificial island drilling rigs in the Gulf of Mexico more than a marine league off shore. We relied in that case on the fact that the accidents bore no relation to any navigational function:

"The accidents in question here involved no collision with a vessel, and the structures were not navigational aids. They were islands, albeit artificial ones, and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers." 395 U. S., at 360.

See also *The Raithmoor*, 241 U. S. 166, 176-177 (1916); *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372, 382 (1918); *Great Lakes Dredge and Dock Co. v. Kierejewski*, 261 U. S. 479, 481 (1923); *Robins Dry Dock and Repair Co. v. Dahl*, 266 U. S. 449, 457 (1925); *London Guarantee and Accident Co. v. Industrial Accident Commission*, 279 U. S. 109, 123 (1929).

Apart from the difficulties involved in trying to apply the locality rule as the sole test of admiralty tort jurisdiction, another indictment of that test is to be found in the number of times the federal courts and the Congress, in the interests of justice, have had to create exceptions to it in the converse situation—i. e., when the tort has no maritime locality, but does bear a relationship to maritime service, commerce, or navigation.

See 7A Moore, Federal Practice, Admiralty ¶ 325 [4]. For example, in *O'Donnell v. Great Lakes Dredge and Dock Company*, 318 U. S. 36 (1943), the Court sustained the application of the Jones Act, 46 U. S. C. § 688, to injuries to a seaman on land, because of the seaman's connection with maritime commerce. We relied in that case on an analogy to maintenance and cure:

"[T]he maritime law, as recognized in the federal courts, has not in general allowed recovery for personal injuries occurring on land. But there is an important exception to this generalization in the case of maintenance and cure. From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land." 318 U. S., at 41-42.

Similarly, the doctrine of unseaworthiness has been extended to permit a seaman or a longshoreman to recover from a shipowner for injuries sustained wholly on land, so long as those injuries were caused by defects in the ship or its gear. *Gutierrez v. Waterman Steamship Corp.*, 373 U. S. 206, 214-215 (1963). See also *Strika v. Netherlands Ministry of Traffic*, 185 F. 2d 555 (CA2 1950).

Congress, too, has extended admiralty jurisdiction predicated on the relation of the wrong to maritime activities, regardless of the locality of the tort. In the Extension of Admiralty Jurisdiction Act, 46 U. S. C. § 740, enacted in 1948, Congress provided:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to a person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

This Act was passed specifically to overrule cases, such as *The Plymouth, supra*, holding that admiralty does not provide a remedy for damage done to land structures by ships on navigable waters. *Victory Carriers, Inc. v. Law*, 404 U. S., at 209 n. 8; *Gutierrez v. Waterman Steamship Corp.*, 373 U. S., at 209-210.*

In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.

II

One area in which locality as the exclusive test of admiralty tort jurisdiction has given rise to serious problems in application is that of aviation. For the reasons discussed above and those to be discussed, we have concluded that maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases.

In one of the earliest aircraft cases brought in admiralty, *The Crawford Bros., No. 2*, 215 Fed. 269, 271 (WD Wash. 1914), in which a libel *in rem* for repairs was brought against an airplane that had crashed into Puget Sound, the federal court declined to assume jurisdic-

*The Court has held, however, that there is no admiralty jurisdiction under the Extension of Admiralty Jurisdiction Act over suits brought by longshoremen injured while working on a pier, when such injuries were caused, not by ships, but by pier-based equipment. *Victory Carriers, Inc. v. Law, supra*; *Nacirema Co. v. Johnson*, 396 U. S. 212, 223 (1969). The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*, was amended in 1972 to cover employees working on those areas of the shore customarily used in loading, unloading, repairing, or building a vessel. Pub. L. No. 92-576, § 2, 86 Stat. 1251 (1972).

tion, reasoning that an airplane could not be characterized as a maritime vessel. *The Crawford Bros.* was followed by a number of cases dealing with seaplanes, in which the courts restricted admiralty jurisdiction to occurrences involving planes that were afloat on navigable waters.⁹ Continuing doubt as to the applicability of admiralty law to aircraft was illustrated by cases in the 1930's and 1940's holding that aircraft owners could not invoke the benefits of the maritime doctrine of limitation of liability,¹⁰ and that crimes committed on board aircraft flying over international waters were not punishable under criminal statutes proscribing acts committed on the high seas.¹¹ Moreover, Congress exempted all aircraft from conformity with United States navigation and shipping laws.¹²

The first major extension of admiralty jurisdiction to land-based aircraft came in wrongful death actions arising out of aircraft crashes at sea and brought under the Death on the High Seas Act, 46 U. S. C. § 761 *et seq.* The federal courts took jurisdiction of such cases because the literal provisions of that statute appeared to

⁹ *Matter of Reinhardt v. Newport Flying Service Corp.*, 232 N. Y. 115, 117-118 (1921); *United States v. Northwest Air Service, Inc.*, 80 F. 2d 804, 805 (CA9 1935). See also *Lambros Seaplane Base v. The Batory*, 215 F. 2d 228, 231 (CA2 1954).

¹⁰ *Dollins v. Pan-American Grace Airways, Inc.*, 27 F. Supp. 487, 488-489 (SDNY 1939); *Noakes v. Imperial Airways, Ltd.*, 29 F. Supp. 412, 413 (SDNY 1939).

¹¹ *United States v. Peoples*, 50 F. Supp. 462 (ND Cal. 1943); *United States v. Cordova*, 89 F. Supp. 298 (EDNY 1950).

In 1952, however, Congress amended the criminal jurisdiction of admiralty to include crimes committed aboard aircraft while in flight over the high seas or any other waters within the admiralty jurisdiction of the United States except waters within the territorial jurisdiction of any State. 18 U. S. C. § 7 (5) (1952).

¹² The Federal Aviation Act of 1958, 72 Stat. 799, as amended, 49 U. S. C. § 1509 (a), the successor to the Air Commerce Act of 1926, 44 Stat. 572, formerly 49 U. S. C. § 177.

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be clearly applicable. The Death on the High Seas Act, enacted in 1920, provides:

"Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representatives of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty"

The first aviation case brought pursuant to the Death on the High Seas Act was apparently *Choy v. Pan-American Airways Co.*, 1941 Am. Mar. Cas. 483 (SDNY 1941), where death was caused by the crash of a seaplane into the Pacific Ocean during a trans-oceanic flight. The District Court upheld admiralty jurisdiction on the ground that the language of the Act was broad and made no reference to surface vessels. According to the court:

"The statute certainly includes the phrase 'on the high seas' but there is no reason why this should make the law operable only on a horizontal plane. The very next phrase 'beyond a marine league from the shore of any State' may be said to include a vertical sense and another dimension." 1941 Am. Mar. Cas., at 484.

Since *Choy*, many actions for wrongful death arising out of aircraft crashes into the high seas beyond one marine league from shore have been brought under the Death on the High Seas Act, and federal jurisdiction has consistently been sustained in those cases.¹³ Indeed, it may be

¹³ See, e. g., *Wyman v. Pan-American Airways, Inc.*, 181 Misc. 963, 966, 43 N. Y. S. 2d 420 (Sup. Ct.) aff'd, 287 App. Div. 947, 48 N. Y. S. 2d 450, appeal denied, 293 N. Y. 878, 49 N. Y. S. 2d 271 (1943); *Higa v. Transocean Airlines*, 230 F. 2d 780 (CA9 1955);

considered as settled today that this specific federal statute gives the federal admiralty courts jurisdiction of such wrongful death actions.

In recent years, however, some federal courts have been persuaded in aviation cases to extend their admiralty jurisdiction beyond the statutory coverage of the Death on the High Seas Act. Several cases have held that actions for *personal injuries* arising out of aircraft crashes into the high seas more than one league off shore or arising out of aircraft accidents in the airspace over the high seas were cognizable in admiralty because of their maritime locality, although they were not within the scope of the Death on the High Seas Act or any other federal legislation.¹⁴ These cases, as well as most of those brought under the Death on the High Seas Act, involved torts both with a maritime locality, in that the alleged negligence became operative while the aircraft was on or over navigable waters, and also with some relationship to maritime commerce, at least insofar as the aircraft was beyond state territorial waters and performing a function—transoceanic crossing—that previ-

Noel v. Linea Aeropostal Venezolana, 247 F. 2d 677, 680 (CA2 1957); *Trihey v. Transocean Air Lines*, 255 F. 2d 824, 827 (CA9 1958); *Lacey v. L. W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (Mass. 1951); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (ND Calif. 1954); *Stiles v. National Airlines, Inc.*, 161 F. Supp. 125 (ED La. 1958), *aff'd*, 268 F. 2d 400 (CA5 1959); *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (NJ 1958); *Lavello v. Danko*, 175 F. Supp. 92 (SDNY 1959); *Blumenthal v. United States*, 189 F. Supp. 439, 445 (ED Pa. 1960), *aff'd*, 306 F. 2d 16 (CA3 1962); *Pardonnet v. Flying Tiger Line, Inc.*, 238 F. Supp. 683 (ND Ill. 1964); *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447, 453-455 (EDNY 1971). Cf. *D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (CA2 1958).

¹⁴ *Bergeron v. Aero Associates, Inc.*, 213 F. Supp. 936 (ED La. 1963); *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874 (WD Pa. 1965); *Horton v. J. and J. Aircraft, Inc.*, 257 F. Supp. 120 (SD Fla. 1966).

ously would have been performed by waterborne vessels.¹³

But a further extension of admiralty jurisdiction was created when courts began to sustain that jurisdiction in situations such as the one now before us—when the claim arose out of an aircraft accident that occurred on or over navigable waters within state territorial limits, and when the aircraft was not on a transoceanic flight. Apparently, the first such case grew out of a 1960 crash of a commercial jet, bound from Boston to Philadelphia, that collided with a flock of birds over the airport runway and crashed into Boston Harbor within one minute after takeoff. *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758 (CA3 1963). In deciding that a wrongful death action arising from this crash was within admiralty jurisdiction, the Court of Appeals for the Third Circuit applied the strict locality rule and found that the tort had a maritime locality. The court further justified the invocation of admiralty jurisdiction in that case by an analogy to the Death on the High Seas Act:

"If, as it has been held, a tort claim arising out of the crash of an airplane beyond the one marine league line is within the jurisdiction of admiralty, then *a fortiori* a crash of an aircraft just short of that line but still within the navigable waters is within that jurisdiction as well." 316 F. 2d, at 765.

There have been a few subsequent cases to like effect.¹⁴

¹³ Whether this type of relationship to maritime commerce is a sufficient maritime nexus to justify admiralty jurisdiction over airplane accidents is discussed *infra*, at pp. 22-23. We do not decide that question in this case.

¹⁴ *Hornsby v. The Fishmeal Co.*, 431 F. 2d 865 (CA5 1970); *Harris v. United States*, 275 F. Supp. 431, 432 (SD Ia. 1967). Cf. *Scott v. Eastern Airlines, Inc.*, 399 F. 2d 14, 21-22 (CA3 1968) (*en banc*).

To the contrary, of course, is the decision of the Court of Appeals for the Sixth Circuit in the present case.

III

These latter cases graphically demonstrate the problems involved in applying a locality alone test of admiralty tort jurisdiction to the crashes of aircraft. Airplanes, unlike waterborne vessels, are not limited by physical boundaries and can and do operate over both land and navigable bodies of water. As Professor Moore has stated, "In both death and injury cases, . . . it is evident that while distinctions based on locality often are in fact quite relevant where water vessels are concerned, they entirely lose their significance where aircraft, which are not geographically restrained, are concerned." 7A Moore, *Federal Practice, Admiralty* ¶.330 [5]. In flights within the continental United States, which are principally over land, the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous. The ALI Study, *supra*, in criticizing the *Weinstein* decision, observed:

"If a plane takes off from Boston's Logan Airport bound for Philadelphia, and crashes on takeoff, it makes little sense that the next of kin of the passengers killed should be left to their usual remedies, ordinarily in state court, if the plane crashes on land, but that they have access to a federal court, and the distinctive substantive law of admiralty applies, if the wrecked plane ends up in the waters of Boston Harbor." ALI Study, *supra*, at 231.¹⁷

Moreover, not only is the locality test in such cases wholly adventitious, but it is sometimes almost impossible

¹⁷ See also Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 Colum. L. Rev. 1084, 1091-1092 (1964).

to apply with any degree of certainty. Under the locality test, the tort "occurs" where the alleged negligence took effect, *The Plymouth, supra, Smith & Son, Inc. v. Taylor, supra*; and in the case of aircraft that locus is often most difficult to determine.

The case before us provides a good example of these difficulties. The petitioners contend that since their aircraft crashed into the navigable waters of Lake Erie and was totally destroyed when it sank in those waters, the locality of the tort, or the place where the alleged negligence took effect, was there. The fact that the major damage to their plane would not have occurred if it had not landed in the lake indicates, they say, that the substance and consummation of the wrong took place in navigable waters. The respondents, on the other hand, argue that the alleged negligence took effect when the plane collided with the birds—over land. Relying on cases such as *Smith & Son, Inc. v. Taylor, supra*, where admiralty jurisdiction was denied in the case of a longshoreman struck by a ship's sling while standing on a pier, and knocked into the water, the respondents contend that a tort "occurs" at the point of first impact of the alleged negligence. Here, they say, the cause of action arose as soon as the plane struck the birds; from then on, the plane was destined to fall, and whether it came down on land or water should not affect "the locality of the act." See *Thomas v. Lane, supra*, at 960.

In the view we take of the question before us, we need not decide who has the better of this dispute. It is enough to note that either position gives rise to the problems inherent in applying the strict locality test of admiralty tort jurisdiction in aviation accident cases. The petitioners' argument, if accepted, would make jurisdiction depend on where the plane ended up—

a circumstance which could be wholly fortuitous and completely unrelated to the tort itself. The anomaly is well illustrated by the hypothetical case of two aircraft colliding at a high altitude, with one crashing on land and the other in a navigable river. If, on the other hand, the respondents' position were adopted, jurisdiction would depend on whether the plane happened to be flying over land or water when the original impact of the alleged negligence occurred. This circumstance, too, could be totally fortuitous. If the plane in the present case struck the birds over the Cleveland Lakefront Airport, admiralty jurisdiction would not lie; but if the plane had just crossed the shoreline when it struck the birds, admiralty jurisdiction would attach, even if the plane were then able to make it back to the airport and crash land there. These are hardly the types of distinctions with which admiralty law was designed to deal.

All these and other difficulties that can arise in attempting to apply the locality test of admiralty jurisdiction to aeronautical torts are, of course, attributable to the inherent nature of aircraft. Unlike waterborne vessels, they are not restrained by one-dimensional geographic and physical boundaries. For this elementary reason, we conclude that the mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

IV

This conclusion, however, does not end our inquiry, for there remains the question of what constitutes, in the context of aviation, a significant relationship to traditional maritime activity. The petitioners argue that any aircraft falling into navigable waters has a sufficient relationship to maritime activity to satisfy the test. The relevant analogy, they say, is not between flying aircraft and sailing ships, but between a downed plane and a sinking ship. Quoting from the *Weinstein* opinion, they contend: "When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels." 316 F. 2d, at 763. The dissenting opinion in the Court of Appeals in the present case made the same argument:

"I believe that there are many comparisons between the problems of aircraft over navigable waters and those of the ships which the aircraft are rapidly replacing. . . . Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings on land. . . . In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers. . . . What I would hold is that tort cases arising out of aircraft crashes into navigable waters are cognizable in admiralty jurisdiction even if the negligent conduct is alleged to have happened wholly on land." 448 F. 2d, at 163.

We cannot accept that definition of traditional maritime activity. It is true that in a literal sense there may be some similarities between the problems posed for a plane downed on water and those faced by a sinking ship. But the differences between the two modes

of transportation are far greater, in terms of their basic qualities and traditions, and consequently in terms of the conceptual expertise of the law to be applied.¹⁸ The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Rules and concepts such as these are wholly alien to air commerce, whose vehicles operate in a totally different element, unhindered by geographical boundaries and exempt from the navigational rules of the maritime road. The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water. Indeed, in contexts other than tort, Congress and the courts have recognized that, because of these differences, aircraft are not subject to maritime law.¹⁹ Although dangers of wind and wave faced by a plane that has crashed on navigable waters may be superficially similar to those encountered by a sinking ship, the plane's unexpected

¹⁸ Moreover, if the mere happenstance that an aircraft falls into navigable waters creates a maritime relationship because of the maritime dangers to a sinking plane, then the maritime relationship test would be the same as the petitioners' view of the maritime locality test, with the same inherent fortuity.

¹⁹ See p. 13, *supra*.

descent will almost invariably have been attributable to a cause unrelated to the sea—be it pilot error, defective design or manufacture of airframe or engine, error of a traffic controller at an airport, or whatever; and the determination of liability will thus be based on factual and conceptual inquiries unfamiliar to the law of admiralty. It is clear, therefore, that neither the fact that a plane goes down on navigable waters nor the fact that the negligence "occurs" while a plane is flying over such waters is enough to create such a relationship to traditional maritime activity as to justify the invocation of admiralty jurisdiction.

We need not decide today whether an aviation tort can ever, under any circumstances, bear a sufficient relationship to traditional maritime activity to come within admiralty jurisdiction in the absence of legislation.²⁰ It could be argued, for instance, that if a plane flying from New York to London crashed in the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims even absent a specific statute.²¹

²⁰ Of course, under the Death on the High Seas Act, a wrongful death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court.

²¹ But see 7A Moore, *Federal Practice, Admiralty* ¶ 330 [5]:

"What possible rational basis is there, for instance, in holding that the personal representative of a passenger killed in the crash of an airplane traveling from Shannon, Ireland to Logan Field in Boston has a cause of action within the admiralty jurisdiction if the plane goes down three miles from shore; may have a cause of action within the admiralty jurisdiction if the plane goes down within an area circumscribed by the shore and the three-mile limit; and will not have a cause of action within the admiralty jurisdiction if the plane managed to remain airborne until reaching the Massachusetts coast? And this notwithstanding that in all instances the plane may have developed engine trouble or been the victim of pilot error at an identical site far out over the Atlantic."

An aircraft in that situation might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels.²² Moreover, other factors might come into play in the area of international air commerce—choice of forum problems, choice of law problems,²³ international law problems, problems involving multi-nation conventions and treaties, and so on.

But none of these considerations is of concern in the case before us. The flight of the petitioner's land-based aircraft was to be from Cleveland to Bangor, Maine, and thence to White Plains, New York—a flight which would have been almost entirely over land and within the continental United States. After it struck the flock of seagulls over the runway, the plane descended and settled in Lake Erie within the territorial waters of Ohio. We can find no significant relationship between such an event befalling a land-based plane flying from one point in the continental United States to another, and traditional maritime activity involving navigation and commerce on navigable waters.

²² Apart from transoceanic flights, the Government's brief suggests that another example where admiralty jurisdiction might properly be invoked in an airplane accident case on the ground that the plane was performing a function traditionally performed by waterborne vessels, is shown in *Hornsby v. The Fishmeal Co.*, 431 F. 2d 865 (CA5 1970), which involved the mid-air collision of two light aircraft used in spotting schools of fish and the crash of those aircraft into the Gulf of Mexico within one marine league of the Louisiana shore.

²³ In such a situation, Professor Moore states, "Were maritime law not applicable, it is argued that recovery would depend upon a confusing consideration of what substantive law to apply, i. e., the law of the forum, the law of the place where each decedent [or injured party] purchased his ticket, the law of the place where the plane took off, or, perhaps, the law of the point of destination." 7A Moore, Federal Practice, Admiralty ¶ 330 [5].

Just last Term, in *Victory Carriers, Inc. v. Law*, 404 U. S. 202, 212 (1971), we observed that in determining whether to expand admiralty jurisdiction, "we should proceed with caution" Quoting from *Healy v. Ratta*, 292 U. S. 263, 270 (1934), we stated:

"The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." *Ibid.*

In the situation before us, which is only fortuitously and incidentally connected to navigable waters and which bears no relationship to traditional maritime activity, the Ohio courts could plainly exercise jurisdiction over the suit,²⁴ and could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeavors.²⁵

²⁴ There is no diversity of citizenship between petitioners and the City of Cleveland.

²⁵ The United States, respondent Dicken's employer, can be sued, of course, only in federal district court under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b) and 2674. Such an action has been filed by the petitioners here, but even in that suit the federal court will apply the substantive tort law of Ohio. Thus, Ohio law will not be ousted in this case, and the pendency of the action under the Tort Claims Act has no relevance in determining whether the instant case should be heard in admiralty, with its federal substantive law.

The possibility that the petitioners would have to litigate the same claim in two forums is the same possibility that would exist if their plane had stopped on the shore of the lake, instead of going into the water, and is the same possibility that exists every time a plane goes down on land, negligence of the federal air traffic controller is alleged, and there is no diversity of citizenship. This problem

It may be, as the petitioners argue, that aviation tort cases should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts so as to avoid divergent results and duplicitous litigation in multi-party cases. But for this Court to uphold federal admiralty jurisdiction in a few wholly fortuitous aircraft cases would be a most quixotic way of approaching that goal. If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.

For the reasons stated in this opinion we hold that, in the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.²⁸

The judgment is affirmed.

cannot be solved merely by upholding admiralty jurisdiction in cases where the plane happens to fall on navigable waters.

²⁸ Some such flights, *e. g.*, New York City to Miami, Florida, no doubt involve passage over "the high seas beyond a marine league from the shore of any State." To the extent that the terms of the Death on the High Seas Act become applicable to such flights, that Act, of course, is "legislation to the contrary."